Supreme Court, U.S.
FILED

001502 MAR 28 2000

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

DOUG GRANT, INC., *et al.*,

Petitioners

v.

GREATE BAY CASINO CORPORATION, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HOWARD A. ALTSCHULER
Counsel of Record
Attorney for Petitioners
LAW OFFICES OF HOWARD A. ALTSCHULER
66 Saltonstall Parkway
East Haven, CT 06512
(203) 467-5577

10699

QUESTION PRESENTED FOR REVIEW

I. Whether serious conflicts of interest of a district court judge that only become known during the pendency of an appeal are harmless under 28 U.S.C. § 455 if the Court of Appeals agrees with the lower court's decision on the merits.

PARTIES TO THE PROCEEDING

Petitioners are Doug Grant, Inc., Richard Andersen, Judy L. Bintliff, Lynn V. Bohsen, Thomas M. Bolick, Michael Bonn, Roland Bryant, Sr., Eugene Clauser, Elmer Conover, Scott Conover, Joseph Curran, Dino D'andrea, Mark F. D'andrea, Warren Davenport, Frank Delia, Karen Dwyer, Dennis F. Foreman, Rosemarie Francis, Stephen Freel, Stavros Georgiou, Kenneth Gross, Adib Hannah, G. Hassan Hattina, Leroy N. Jordan, Roman Kern, Richard H. Kessel, Scott Klee, Jeffrey S. Krah, Kathleen E. Lane-Bourgeois, Thomas J. Lotito, Jr., James Macelroy, Martin Malter, Stanley P. Mcanally, Anne T. Mcgowan-Novak, Eugene L. Miserendino, Daniel G. Nauroth, Matthew S. Pellenberg, Daniel Pilone, Stephen F. Pinciotti, Robert E. Prout, Martin Rose, Lynn Rufo, Vincent Salek, Arlen Schwerin, Joseph Scioscia, William F. Strauss, Douglas G. Telman, Aino Tomson, Ants Tomson, Thomas Tomson, Linwood C. Uphouse, Dolores Valancy, Andrew R. Vardzal, Jr., Grant Douglas Von Reiman, Kenneth J. Warner, Steven Watters, Paul V. Yannessa, Doug Grant College of Winning Blackjack, Inc., Sigma Research, Inc., Beta Management, Inc., Favorable Situations Only Inc., t/a Doug Grant Institute of Winning Blackjack, Jan C. Muszynski, Linda Tompson

Respondents are Greate Bay Casino Corporation, Greate Bay Hotel and Casino t/a Sands Hotel and Casino, Sands Hotel and Casino, Hilton Hotels Corporation, GNOC Corp. t/a "Atlantic City Hilton," Atlantic City Hilton, Bally's Park Place, Inc. t/a "Bally's Park Place," Bally's Park Place, ITT Corporation, ITT Corporation NV, Caesar's World, Inc. a/k/a "Caesar's Atlantic City," Caesar's World, Claridge Hotel & Casino Corp., Claridge At Park Place, Inc., Harrah's Entertainment, Inc., Marina Associates d/b/a "Harrah's Casino Hotel", Harrah's Casino Hotel, Sun International North America Inc., Sun International Hotels Ltd., Resorts International Hotel, Inc., Resorts Casino Hotel, Showboat,

Inc., Showboat, Aztar Corporation, Adamar of New Jersey, Inc., (Formerly Trop World Casino and Entertainment Resort) t/a Tropicana Casino and Resort, Tropicana Casino and Resort, Trump Hotels & Casino Resorts, Inc., Trump Hotels & Casino Resorts Holdings, L. P., Trump Atlantic City Associates, Trump Plaza Associates, L. P., Trump Plaza Associates, Trump Plaza Hotel and Casino, Trump Taj Mahal Associates, Trump Taj Mahal Casino Resort, The Trump Organization, Inc., Trump's Castle Associates, L. P., Trump Castle Associates, Trump Marina Casino Hotel Resort, formerly Trump's Castle Casino Resort, John Does 1-100, Griffin Investigations

CORPORATE DISCLOSURE STATEMENT

Petitioner corporations, Doug Grant, Inc., Doug Grant College of Winning Blackjack, Inc., Sigma Research, Inc., Beta Management, Inc., and Favorable Situations Only Inc., t/a Doug Grant Institute of Winning Blackjack, do not have any parent corporations.

No publicly held company owns 10% or more of any of the stock of the petitioner corporations.

TABLE OF CONTENTS

Question Presented For Review i

Parties to the Proceeding ii

Corporate Disclosure Statement iii

Table of Contents iv

Table of Appendices v

Table of Authorities vii

Opinions below 1

Basis for Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of the Case 2

A. Overview 2

B. Proceedings Below 3

Statement of Facts 4

A. After obtaining evidence of a potential conflict of interest, petitioners asked the Third Circuit to order an evidentiary hearing to determine conclusively whether the district judge or his firm represented one or more of the casino defendants on issues related to the case 4

B. Petitioners sought an evidentiary hearing to determine whether the district judge had a financial interest in the outcome of the case 6

C. Petitioners sought an evidentiary hearing to determine whether the district judge's rulings were based on information obtained extra-judicially or from a partiality arising from his conflicts of interest 7

(1). The district judge's failure to disclose potential conflicts in his letter to petitioners created uncertainty as to whether he fully disclosed his own blackjack playing experience at casinos, and whether he received complimentaries from one or more of the casino defendants 7

(2). The district judge's strongly worded criticisms of the petitioners for seeking revocation of the casino defendants' licenses demonstrate partiality arising from his former firm's representation of companies in casino licensing matters 8

Reasons for Granting the Writ 10

I. The Third Circuit's holding that a district judge's conflict of interest is irrelevant when a Court of Appeals agrees with a lower court's decision on the merits, is incompatible with 28 U.S.C. § 455 and this Court's holding in *Liljeberg v. Health Serv. Acquisition Corporation.* It is also in conflict with the Sixth Circuit's view that such conflicts of interest are not permissible under any circumstance. 10

CONCLUSION 13

TABLE OF APPENDICES

Appendix A: Summary Order of the United States Court of Appeals for the Third Circuit Entered on November 2, 2000. ..... 1a

Appendix B: Order of the Third Circuit, Denying Sur Petition for Rehearing Entered on December 29, 2000. ..... 3a

Appendix C: Third Circuit Opinion, 232 F.3d 173 (3rd Cir. 2000) Entered on November 2, 2000. ..... 4a

Appendix D: Opinion of the United States District Court Entered on May 1, 1998 ..... 35a

Appendix E: Experts from Transcript of Oral Arguments Before Hon. Joseph E. Irenas, April 28, 1998. ..... 80a

Appendix F: 28 U.S.C. § 455 ..... 82a

TABLE OF AUTHORITIES

FEDERAL CASES

Doug Grant, Inc. v. Greate Bay Casino Corporation, 232 F.3d 173 (3d Cir. 2000) 1

Doug Grant, Inc. v. Greate Bay Casino Corporationl, 3 F. Supp. 2d 518 (D.N.J. 1998) 1

Easley v. University of Michigan Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988) 2, 11

Hyland v. Griffin Investigation, Civ. A. No. 95-223 (1996) .. 10

Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847 (1988) 2, 10

Marcangelo v. Boardwalk Regency Corp., 847 F. Supp. 1222 (D.N.J. 1994) 10

Offutt v. United States, 348 U.S. 11 (1954) 11

Republic of Panama v. American. Tobacco Company Inc., 217 F.3d 343 (5th Cir. 2000) 12

STATE CASES

Department of Law & Pub. Safety v. Gonzalez, 142 N.J. 618 (1995) 11

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 455 ..... i, 2, 10, 12

STATE STATUTES

N.J.S.A. 2C:41-4(a) 8

N.J.S.A. 5:12-1(8) 9

N.J.S.A. 5:12-153 6

N.J.S.A. 5:12-162(a) 6

N.J.S.A. 5:12-162(j) 6

N.J.S.A. 5:12-99 5

FEDERAL RULES

Fed. R. Civ. P. 12(b)(6) 3,

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Third Circuit Court of Appeals.

OPINIONS BELOW

The Third Circuit's opinion is reported at *Doug Grant, Inc. v. Greate Bay Casino Corporation*, 232 F.3d 173 (3d Cir. 2000). *App. at 4a.*

The district court's opinion is reported at *Doug Grant, Inc. v. Greate Bay Casino Corporation*, 3 F. Supp. 2d 518 (D.N.J. 1998). *App. at 35a.*

BASIS FOR JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on November 2, 2000. *App. at 1a.*

The Third Circuit entered an order denying a petition for rehearing en banc on December 29, 2000. *App. at 3a.*

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 28 U.S.C. § 455 as it applies to a judge's conflict of interest arising from prior representation of defendants, a financial interest in the outcome of the case and information obtained extra-judicially.

Pursuant to this Court's Rule 14.1(f), the provisions of 28 U.S.C. § 455 are set forth, *infra. App. at 82a-84a.*

STATEMENT OF THE CASE

A. OVERVIEW

Based on evidence obtained during the pendency of the appeal, the petitioners filed an emergency motion with the Third Circuit for an evidentiary hearing to determine if the district court judge had (1) a serious conflict of interest due to prior representation of one or more of the casino respondents on issues related to the case below, (2) a direct financial interest in the outcome of the case, (3) extra-judicially obtained information relevant to the case and (4) improperly failed to disclose these conflicts in response to a written request from petitioners for such disclosure.

The Third Circuit's holding that a district court's conflicts of interest are irrelevant if the Court of Appeals agrees with the lower court's decision (*App. at 34a, n.8*) is at odds with 28 U.S.C. § 455 and with this Court's holding that federal courts should avoid even the appearance of impropriety. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988).

The holding is also in conflict with the Sixth Circuit, which granted a motion for an evidentiary hearing on a possible conflict of interest even though it agreed with the district court's disposition of the case. *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351 (6th Cir. 1988).

The appearance of impropriety in this case is heightened by the fact that one of the Third Circuit judges who participated in the ruling to deny the petitioners' motion for a rehearing also may have had a serious conflict of interest: a connection to one of the law firms representing the casino defendants on the motion for rehearing. *See infra, pg. 3.*

B. PROCEEDINGS BELOW

In July 1997, petitioners filed a state lawsuit in New Jersey Superior Court, alleging Atlantic City casinos regularly cheated at blackjack, defrauding blackjack patrons out of millions of dollars every year.

The casino defendants removed the case to the District Court of New Jersey where it was assigned to the Hon. Joseph E. Irenas. The casino defendants then filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). On May 1, 1998, Judge Irenas dismissed with prejudice all claims related to the allegations of casino cheating. He remanded other claims not subject of this petition to New Jersey state court. The petitioners appealed Judge Irenas' decision on May 29, 1998.

In September 2000, the petitioners filed an emergency motion with the Third Circuit Court of Appeals. Petitioners sought an evidentiary hearing to investigate newly obtained information that Judge Irenas' former law firm may have represented one or more of the casino defendants on matters related to the case while Judge Irenas was a partner at the firm, among other potential conflicts of interest.

The three-judge panel denied the emergency motion on November 2, 2000. The petition for rehearing *en banc* was denied by the Third Circuit on December 29, 2000.

One of the Third Circuit judges participating in the decision to deny petitioners' motion for a rehearing also may have had a conflict of interest. The Hon. Maryanne Trump Barry's recently deceased husband's law firm, *Tompkins, McGuire & Barry*, represented several casino defendants in the very motion on which she ruled. Until his death, Judge Barry's husband had also been lead counsel for those casino defendants. *App. at 35a.* That firm continues to represent some of the casino defendants in this case. *App. at 5a.*

STATEMENT OF FACTS

During the pendency of the appeal, facts came to light that raised serious concerns that Judge Irenas may have had undisclosed conflicts of interest or financial interests when he dismissed petitioners' case in May 1998.[1]

Petitioners wrote to Judge Irenas on March 14, 2000, after receiving unconfirmed information of a conflict of interest. Petitioners respectfully requested that Judge Irenas clarify the information and that he disclose any other potential conflicts he or his former firm may have had. Petitioners also requested financial disclosure from Judge Irenas.

On March 16, 2000, Judge Irenas responded that he was unaware of any conflict of interest arising out of his prior association with McCarter & English.

Relying on Judge Irenas' denials of any conflict of interest, petitioners took no further action other than request the financial disclosure information from the Administrative Office of the United States Court, as Judge Irenas suggested.

A. After obtaining evidence of a potential conflict of interest, petitioners asked the Third Circuit to order an evidentiary hearing to determine conclusively whether the district judge or his firm represented one or more of the casino defendants on issues related to the case

In September 2000, several weeks before oral arguments in the appeal below, counsel for petitioners received copies of two letters authored by an attorney at Judge Irenas' former law firm, McCarter & English (hereafter "McCarter letters").

---

[1] These facts were not learned until two years after the district court ruled in May 1998. Thus, no recusal motion had been made at the district court level.

These McCarter letters, and an attached firm résumé, contradicted Judge Irenas' representation that McCarter & English had not performed any legal work related to the case. For one example, the McCarter letters made clear that Judge Irenas' former firm was extensively involved in a wide range of casino related issues, including representing companies seeking casino licenses and vendors of goods and services to casinos.

This is significant because the petitioners' complaint alleged that the casinos did not comply with licensing procedures required by New Jersey law, and engaged in fraudulent activities, using goods sold to casinos by vendors of blackjack card counting systems. The petitioners' lawsuit also sought the revocation of the defendants' casino licenses.

If McCarter & English represented companies seeking casino licenses, it was all but certain that the firm helped one or more of the casino defendants obtain their casino licenses and gave them advice on legal issues when Judge Irenas was a partner at the firm.

For an example of such legal advice likely given by McCarter & English that Judge Irenas also had to rule upon in the petitioners' case, New Jersey casino licensing includes submission of written details of a casino's operation. These submissions are required under the Casino Control Act, Section 99. *N.J.S.A.* 5:12-99. The petitioners' complaint before Judge Irenas alleged that the casinos violated Section 99 by failing to submit required details. *App. at 14a, 48a.* Violations of Section 99 are felony offenses in New Jersey and can subject an offender to heavy fines and a loss of license.

Though the McCarter letters strongly implied Judge Irenas had a conflict of interest, the letters did not contain specific names or dates. Only an evidentiary hearing could finally resolve whether Judge Irenas had a conflict of interest as defined by 28 U.S.C. § 455. *App. at 82a-84a.*

B. Petitioners sought an evidentiary hearing to determine whether the district judge had a financial interest in the outcome of the case

Judge Irenas' financial disclosure statement, which took months to obtain from the Administrative Office of the United States Court, indicates that at the time he rendered a decision in the case, he had investments in New Jersey municipal and state bonds such as the New Jersey-New York Port Authority, New Jersey State General Obligation Bonds, New Jersey Transit Authority, New Jersey Economic Development Authority, New Jersey Turnpike Authority and others.

In papers filed below, the casinos stated that the outcome of the case would have a substantial financial impact on the state of New Jersey, particularly the New Jersey Tourism Industry. Thus, it appears that the investments of Judge Irenas may have been directly and substantially impacted by his rulings affecting casinos.

The issue of Judge Irenas' bond holdings was further complicated by the fact that McCarter & English acted as a trustee for the Casino Reinvestment Development Authority, which invests revenues derived from the 8% tax on casino winnings from patrons, a substantial part of which comes from blackjack players. *N.J.S.A.* 5:12-153.

The Casino Reinvestment Development Authority may issue bonds to casino licensees, including defendants. *N.J.S.A.* 5:12-162(a). The Authority also may permit casinos to purchase New Jersey state bonds. *N.J.S.A.* 5:12-162(j). According to the McCarter & English résumé, the firm has served as bond counsel to the State of New Jersey.

Additionally, according to Judge Irenas' financial disclosure statement, he has a KEOGH retirement plan with McCarter & English.

There was no information in the disclosure statement indicating whether Judge Irenas' retirement plan benefited directly or indirectly from any fees that McCarter & English received in any representation of casino related interests, their agents or subsidiaries, or the interests of vendors who promote patron card counting in casinos.

Without an evidentiary hearing and detailed review of those investments and fees, it was impossible to determine conclusively whether Judge Irenas' investments and pension plan were directly impacted by his decision in the case.

C. Petitioners sought an evidentiary hearing to determine whether the district judge's rulings were based on information obtained extra-judicially or from a partiality arising from his conflicts of interest

> ***(1). The district judge's failure to disclose potential conflicts in his letter to petitioners created uncertainty as to whether he fully disclosed his own blackjack playing experience at casinos, and whether he received complimentaries from one or more of the casino defendants***

Judge Irenas remarked during oral arguments: "Everybody knows, unless they've changed the rules of the game since . . . I became a judge, I don't go to the casinos because we have too many cases involving them, but I have to confess, I was more than a one or two time attender at the blackjack tables before I became a judge." *App. at 81a.*

If Judge Irenas played blackjack in Atlantic City, it is likely he was given complimentaries by one or more of the casino defendants in this case. The casino defendants' failure to pay earned complimentaries to petitioners was a key allegation of the complaint before Judge Irenas. *App. at 25a.*

Thus, Judge Irenas may have reached a decision based on his personal experience playing blackjack at casinos operated and owned by defendants, or by the amount of "comps" Judge Irenas may have received.

The question of whether Judge Irenas was sufficiently candid in his disclosure that he previously played blackjack arose only after receipt of the McCarter & English letters in September 2000. For example, those letters stated that the firm "represented Playboy Enterprises in connection with its attempts to secure the approvals necessary to operate a casino." In contrast, Judge Irenas was only partly accurate when he incompletely informed petitioners that his representation of Playboy "related to its **divestiture** of its interest in the casino . . ." (emphasis added).

Only an evidentiary hearing could determine whether Judge Irenas had disclosed the full extent of his blackjack play at casinos before he became a judge, whether he had received complimentaries from any of the casino defendants, and if so, how much.

> ***(2). The district judge's strongly worded criticisms of the petitioners for seeking revocation of the casino defendants' licenses demonstrate partiality arising from his former firm's representation of companies in casino licensing matters***

In his written opinion, Judge Irenas criticized the petitioners for seeking the revocation of the casinos' license to operate. *App. at 33a, n.1.* Similarly, at oral argument, Judge Irenas was clearly upset that petitioners sought the revocation of casino licenses as a possible relief, although such relief is expressly authorized by New Jersey RICO. *N.J.S.A.* 2C:41-4(a). *App. at 80a.*

In light of Judge Irenas' failure in his March 16, 2000 letter to disclose that McCarter & English had been involved in seeking licenses to operate casinos while he was a partner at the firm, Judge Irenas' remarks raise a serious concern that his decision in the case was unduly influenced by his former firm's involvement in advising companies on licensing issues.

In New Jersey, a casino license is a "revocable privilege conditioned upon the discharge of the affirmative responsibility of each such licensee or registrant to provide to the regulatory and investigatory authorities established by this act any assistance and information necessary to assure that the policies declared by this act are achieved." *N.J.S.A.* 5:12-1(8).

The complaint dismissed with prejudice by Judge Irenas specifically alleged that the casino defendants failed to discharge their responsibility to provide the regulatory and investigatory authorities with such assistance and information.

This raises the possibility that McCarter & English, at a time Judge Irenas was a partner with the firm, may have counseled one or more of the casino defendants not to provide the regulatory and investigatory authorities with the required information, or not to submit Section 99 controls for blackjack "countermeasures" that were at issue in the appeal.

Judge Irenas became a federal district judge in 1992. Before that, he had been with McCarter & English since 1966, including over twenty years as a partner. When he first became a federal judge, Judge Irenas handled several casino related cases and had ample opportunity and obligation to determine whether he or his former firm had prior connections to Atlantic City casinos, or a financial interest in their well-being. *See Hyland v. Griffin Investigation*, Civ. A.

No. 95-223 (1996), *Marcangelo v. Boardwalk Regency Corp.*, 847 F. Supp. 1222 (D.N.J. 1994).

The discrepancies between the letters from Judge Irenas and his former firm were inexplicable and required an evidentiary hearing to avoid an appearance of impropriety. Yet, without hearing evidence or providing an explanation, the Third Circuit asserted that the allegations of potential conflicts were meritless.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's holding that a district judge's conflict of interest is irrelevant when a Court of Appeals agrees with the lower court's decision on the merits, is incompatible with 28 U.S.C. § 455 and this Court's holding in *Liljeberg v. Health Serv. Acquisition Corporation.* It is also in conflict with the Sixth Circuit's view that such conflicts of interest are not permissible under any circumstance.

The goal of 28 U.S.C. § 455(a) is to avoid the appearance of partiality, even when no actual partiality exists because the judge does not recall the facts, actually has no interest in the case or is incorruptible. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988).

Under 28 U.S.C. § 455(b)(2), a federal judge must disqualify himself where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such an association as a lawyer concerning the matter.

A judge is also disqualified for having a financial interest no matter how insubstantial the financial interest and whether the interest actually creates the appearance of impropriety. *Liljeberg* at 486 U.S. 861. 28 U.S.C. § 455(b)(4).

In *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351 (6th Cir. 1988), the Sixth Circuit granted an emergency motion for a remand, submitted four days before oral argument, with orders to the district court to enlarge the record regarding the nature of the judge's connection to the University of Michigan, the possibility the judge acquired extra-judicial knowledge of matters material to that controversy through these associations with the university, and for a determination whether the judge's impartiality in that matter might "reasonably be questioned."

The *Easley* court noted "the fact that [the district court's] rulings in the case might be legally correct does not render Easley's motion moot. The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same anyway." *Id.*

The district court in *Easley* held such a hearing after providing the parties sufficient time and opportunity to obtain relevant discovery. *Easley v. University of Michigan Bd. of Regents*, 906 F.2d 1143 (6th Cir. 1990).

The rulings by Judge Irenas involve issues of the gravest concern to the State of New Jersey. The heart of public policy embraced by the Casino Control Act is the public confidence and trust in the credibility and integrity of the regulatory process and casino operations. *Department of Law & Pub. Safety v. Gonzalez*, 142 N.J. 618 (1995).

'A writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit. As this Court has noted, "justice must . . . satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11 (1954).

By denying a hearing, the Third Circuit denied petitioners the right to resolve the facts regarding Judge Irenas' potential conflicts set forth in the McCarter letters and his financial disclosure statement. This undermines the underlying purpose of Section 455. The Fifth Circuit has noted:

> "The review of a recusal order under §455(a) is extremely fact intensive and fact bound, thus a close recitation of the factual basis for the appellants recusal motion is necessary. . . The analysis of a §455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim."

Republic of Panama v. American. Tobacco Company Inc., 217 F.3d 343 (5th Cir. 2000) (internal quotation marks omitted).

In this case, the Third Circuit engaged in no examination of the facts and did not even provide an explanation as to why the panel determined that Judge Irenas did not have a financial interest or the appearance of a conflict of interest.

Conflicts of interest of district judges should not be made irrelevant by a plenary review any more than ethical violations of attorneys should be ignored if that attorney happens to win the case that gave rise to the ethical violation.

The Third Circuit's conclusion that its plenary affirmation renders moot any conflict of interest of the district court is incorrect under 28 U.S.C. § 455 and sends the wrong message to the public and to district court judges.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD A. ALTSCHULER
Counsel of Record
Attorney for Petitioners
LAW OFFICES OF HOWARD A. ALTSCHULER
66 Saltonstall Parkway
East Haven, CT 06512
(203) 467-5577

APPENDIX A: SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED ON NOVEMBER 2, 2000.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-529 1

DOUG GRANT, INC., ET AL.

Appellants

v.

GREATE BAY CASINO CORPORATION, ET AL,

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 97-0429 1)

BEFORE: NYGAARD, GREENBERG and COWEN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on October 5, 2000.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this court that the order for partial dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted, and for remand of the remaining aspects of the case to the Superior Court of New Jersey, entered May 1, 1998, is modified to the end that count six of the complaint is dismissed without prejudice to the

extent that the count related to sending offensive messages and threats over the Internet, but otherwise be and is hereby affirmed, all in accordance with the opinion of the court.

ATTEST:

Marcia M. Waldron, Clerk

DATED: November 2, 2000

Certified as a true copy and issued in lieu
of a formal mandate on January 9, 2001

Clerk, United States Court
of Appeals for the Third Circuit

APPENDIX B: ORDER OF THE THIRD CIRCUIT, DENYING SUR PETITION FOR REHEARING ENTERED ON DECEMBER 29, 2000.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 98-529 1

DOUG GRANT, INC., ET AL.

Appellants

v.

GREATE BAY CASINO CORPORATION, ET AL,

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-04291)
SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, MANSMANN, SCIRICA, NYGAARD, AUTO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, GREENBERG and COWEN, Circuit Judges

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

DATE: December 29, 2000
By the Court,
'Judge Greenberg's and Judge Cowen's votes are limited to panel rehearing only.

APPENDIX C: THIRD CIRCUIT OPINION, 232 F.3d 173 (3rd Cir. 2000) ENTERED ON NOVEMBER 2, 2000.

DOUG GRANT, INC., ET AL.

Appellants

v.

GREATE BAY CASINO CORPORATION, ET AL,

No. 98-5291

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2000 U.S. App. LEXIS 27465, 232 F.3d 173

October 5, 2000, Argued
November 2, 2000, Filed

PRIOR HISTORY: [*1] On Appeal from the United States District Court for the District of New Jersey. (D.C. Civ. No. 97-04291). District Judge: Honorable Joseph E. Irenas.

DISPOSITION: Modify the order of dismissal to provide that count six partially dismissed without prejudice, and affirmed the order of dismissal with prejudice, affirmed the order remanding the remaining aspects of the complaint to the Superior Court of New Jersey. Remanded the case to the district court to enter an order consistent with this opinion.

COUNSEL: Howard A. Altschuler (argued), East Haven, CT, Attorney for Appellants.

Frederick H. Kraus, Sands Hotel & Casino, Atlantic City, NJ, Attorney for Appellees Greate Bay Casino, Greate Bay Hotel and Sands Hotel and Casino.

Adam N. Saravay (argued) Tompkins, McGuire, Wachenfeld & Barry, LLP, Newark, NJ, Attorneys for the Trump Casino Appellees and Co-Counsel for the Remaining Casino Appellees and Griffin Investigations.

John M. Donnelly (argued) Levine, Staller, Sklar, Chan, Brodsky, & Donnelly, P.A., Atlantic City, NJ, Attorneys for Casino Appellees (other than the Trump Casino Defendants) and Griffin Investigations.

JUDGES: BEFORE: NYGAARD, GREENBERG and COWEN, Circuit Judges.

OPINIONBY: GREENBERG [*2]

OPINION: OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before this court on appeal from an order entered on May 1, 1998, partially dismissing this action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. n1 See Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518 (D.N.J. 1998). The appellants had instituted this action in the Superior Court of New Jersey but the appellees removed it to the district court. Consequently, when the district court entered the Rule 12(b)(6) order it remanded appellants' state-law claims that it did not address to the Superior Court. In view of the procedural posture of this case, we treat the allegations of fact in the complaint as true, and consider them in a light most favorable to the appellants. n2

----------Footnotes----------

n1 In our extensive Introduction and at other places in our opinion, we essentially have tracked the district court's comprehensive opinion. We also note that the Supreme Court of New Jersey in Campione v. Adamar of N.J., Inc., 155 N.J. 245, 714 A.2d 299, 301, 305-06 (N.J. 1998), discussed the countermeasures the New Jersey Casino Control Commission has allowed the casinos to take against card-counters. Of course, the casinos' use of these countermeasures is at the heart of this case. [*3]

n2 Inasmuch as the complaint references and relies on the content of certain documents, we consider them on this appeal. See Churchill v. Star Enter., 183 F.3d 184, 190 n.5 (3d Cir. 1999); Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir. 1989). Indeed, this case is unusual as the appendix consists of four volumes and thus is of a length which might be expected on an appeal from a summary judgment rather than on appeal from a motion to dismiss.

----------End Footnotes----------

The individual appellants are blackjack players who have frequented Atlantic City casinos operated by the casino appellees. Of the 60 individual appellants, all but six have developed card-counting skills for playing blackjack enabling them to reduce or eliminate the nor mal odds in favor of the casinos and, indeed, to turn the odds in their favor. The corporate appellants are associated with appellant Doug Grant, Inc., a New Jersey corporation, whose predecessor corporations operated card-counting schools and mock casinos established by the appellant, Doug Grant, a renowned card-counter. Doug Grant, Inc. also provided the training [*4] for several cooperative player groups, including many of the appellants her e, who pooled their

financial resources and agreed to share their blackjack winnings.

A. The Play of Blackjack, Card-Counting and Shuffling At-Will and Other Countermeasures

The gravamen of appellants' complaint is that the casinos have taken countermeasures that the appellants regard as illegal to eliminate the advantage that a skilled card-counter may have over them in playing blackjack, the one casino game in which a player's skill may increase his chance of winning to the point of eliminating the winning odds in favor of the "house." See Campione v. Adamar of N. J., Inc., 155 N.J. 245, 714 A.2d 299, 301 (N.J. 1998). Card-counters use intellect and memory to identify the time during the course of play when a player's odds of winning are better or worse. Thus, the individual appellants allege that the casinos have impaired their ability to win money from the casinos in blackjack. The corporate appellants allege that their schools and mock casinos were forced to close as a result of the casinos' countermeasures against card-counters, and because of bomb threats, break-ins, destruction of property, [*5] theft of student lists, stalking and other intimidation tactics.

It is necessary for us partially to describe how blackjack games are run in order to put appellants' allegations in context. Blackjack is played with decks containing 52 cards of four suits (hearts, diamonds, clubs and spades) with each suit containing 13 cards (Ace, King, Queen, Jack, 10, 9, 8, 7, 6, 5, 4, 3, 2). See N.J.A.C. § 19:46-1.17. Before a blackjack game starts, the dealer receives one or more, usually between six to eight, card decks from a casino supervisor and inspects them in the presence of the floorperson. See id. § 19:47-2.4(a). After inspecting the cards, the dealer takes them to a blackjack table and spreads them out in a fan, face upward, for visual inspection by the first player or players to arrive at the table. See id. § 19:47-2.4(b). After these players are afforded an opportunity to inspect the cards, the dealer

turns them face downward on the table, mixes them thoroughly, and shuffles them until they are "randomly intermixed." The dealer then places the cards into a stack. See id. § 19:47-2.4(c); id. § 19:47-2.5(a). After the shuffling is completed, the dealer asks the player seated [*6] at a particular position at the table, as defined by the regulations of the Casino Control Commission ("CCC"), the casino regulatory agency, id. 19:47-2.5(e), to cut the deck. See id. § 19:47-2.5(b). The player cuts the deck by placing a plastic cutting card in the stack at least ten cards from either end. See id. § 19:47-2.5(c).

Once the player has inserted the cutting card, the dealer takes all the cards in front of the cutting card and places them at the back of the stack. See id. § 19:47-2.5(d). The dealer then takes the entire stack of shuffled cards and cuts and aligns it along the side of the dealing shoe which has a mark on its side enabling the dealer to insert the cutting card so that it is in a position "at least approximately" one-quarter of the way from the back of the stack. See id. § 19:47-2.5(d); id. § 19:46-1.19(d)(4). The dealer then inserts the stack of cards into the dealing shoe for commencement of play. See id. § 19:47-2.5(d). The cards behind the cutting card will not be used during the game.

Once play has commenced the dealer deals the cards to the players in a series of hands until the dealer reaches the cutting card. When the dealer reaches the [*7] cutting card, the dealer repeats the shuffling process and cutting procedures described above. See id. § 19:47-2.5(h).

A blackjack player's object is to reach as close as possible to a total card value of 21 without exceeding that value. A player exceeding 21 loses regardless of the dealer's subsequently acquired hand. Persons in the casino industry and card-counters have come to recognize that, in a player's endeavor to reach a value as close as possible to 21, certain cards are more favorable to the player and certain cards are more

favorable to the dealer. In particular, appellants assert that the Ace, King, Queen, Jack and Ten are favorable to a player, but the 6, 5, 4, 3, and 2 are favorable to the dealer and thus to the house. The 7, 8, and 9 are said to be neutral. At any point during the play, the cards in a shoe can contain more player-favorable cards or more dealer-favorable cards. When there are more player-favorable cards, a player's chances of winning are increased but when there are more dealer-favorable cards, the dealer's chances of winning are increased. Whether and when a shoe will turn out to be player- or dealer-favorable is purely random.

Card-counters attempt [*8] to "count cards" to determine whether and when a shoe is player-favorable. They then vary their bets, i.e., betting high when the shoe is player-favorable and low when the shoe is dealer-favorable to increase their chances of having a winning round of play. Bets are placed before each individual round of blackjack, usually within established minimum and maximum limits for the table. According to the appellants, successful card-counting contains several basic elements including the assignment of a point value to each card, maintaining a running total of those points during play, betting strategies, playing strategies, money management, a sufficient bankroll, and "the intangible ability to consistently apply these interrelated strategies under fast-paced casino conditions." See app. at 24.

For maximum advantage, card-counters need to be able to view, through the rounds of play, as many of the cards in the shoe as possible. The greater number of cards they are able to view, the easier it is for them to determine to whom the remaining cards in the shoe are favorable. For this reason, card-counters prefer that the dealer place the cutting card toward the end of the shoe, leaving a small [*9] number of cards behind the cutting-card and increasing the overall number of cards in play. Card-counters also prefer to have the entire shoe of cards played. If the dealer reshuffles prior

to reaching the cutting card, then the card-counters' opportunity to bet high on a shoe with a remainder of mostly player-favorable cards is impaired. The casinos, on the other hand, prefer to decrease the card-counters' opportunity to bet high on a player-favorable shoe. Therefore, it is in their interest to decrease the card-counters' chances of determining whether a shoe is player-favorable by playing with fewer cards in the shoe, i.e., placing the cutting card as far from the back of the stack as permitted by the CCC regulations. It is also in the casinos' interest to reshuffle prior to reaching the cutting card when the remaining cards in a shoe are player-favorable. These practices, however, come at a cost to the casino as the more often the dealer goes through the meticulous shuffling process, the shorter the actual time of play and thus the smaller the casino's profits.

Appellants allege that the casinos maintain card-counting teams and/or video and computer surveillance equipment to identify [*10] card-counters and inform the dealers of their participation in a blackjack game so that the dealers can take countermeasures against them. Appellants challenge these practices, claiming they violate the New Jersey "cheating games" section in the Casino Control Act, N.J. Stat. Ann. § 5:12-115 (West 1996), which provides that it shall be unlawful:

> Knowingly to deal, conduct, carry on, operate or expose for play any game or games played with cards . . . which have in any manner been marked or tampered with, or placed in a condition, or operated in a manner, the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game.

The appellants make several specific allegations to support their claims. See Doug Grant, 3 F. Supp. 2d at 524-25. First, they argue that the card-counter identifying process fundamentally is flawed because it tends unfairly to misidentify non-card-counters as card-counters. They claim casinos define card-counters as (1) any patron who increases a bet during a player-favorable count, or (2) any patron [*11] who knows or is related to someone who has increased a bet during a player-favorable count. According to appellants, a player the casino identifies as a card-counter is "branded for life" and never is able to play a "fair" game of blackjack without being subjected to countermeasures. The casinos allegedly share information about suspected card-counters through defendant Griffin Investigations and other similar agencies. These agencies allegedly keep dossiers containing the pictures of suspected card-counters which casino employees then use to spot card-counters for the purpose of knowing when to implement countermeasures.

Second, appellants claim that the casinos utilize what they term the "cheating-at-will" preferential shuffle and which, as codified by the CCC regulations, generally is known as the "shuffle-at-will." A dealer reshuffling prior to reaching the cut-card marker shuffles-at-will. A casino will shuffle in this manner when its card-counting team determines that the shoe is player-favorable at a table where it suspects card-counters are playing. Appellants allege that the shuffle-at-will provides an extra 2% advantage to the casino, nearly double its nor mal chance of [*12] winning, and thus providing the casinos with a windfall of millions of dollars. Id. at 525. They also claim that a casino can shuffle-at-will abusively to the disadvantage of players who are not card-counters by shuffling-at-will even when its employees do not suspect that there is a card-counter playing at a table. Id.

Appellants recount specific instances in which individual appellants allegedly were subjected to shuffling-at-will by specific casinos throughout the past ten years. On some, but

not all, of these occasions, the player reported the shuffle-at-will to the CCC and/or the New Jersey Department of Gaming Enforcement ("DGE") official on-site at every casino. According to appellants, the casinos never have responded to such complaints by admitting to counting cards and shuffling during a player-favorable count. Id.

Appellants also allege that because they have been identified as card-counters, they are limited to one wager at a time, are refused cards, have bets pushed back, and are forced to bet below the original posted limit at the table. Id. Moreover, they allege that "shills" associated with the casinos sometimes occupy all seats at tables at which they [*13] wish to play. Id. The appellants allege that they have been treated in these adverse ways even though players who are not card-counters are not so treated.

Appellants also claim that the casinos have denied them hospitality "comps," such as meals, after identifying them as card-counters. Id. Finally, appellants allege that they have been threatened, assaulted and stalked because of their suspected card-counter status. Id. They allege that they have been threatened in person while at the casinos by both known and unknown casino employees and that they have been threatened and sent pornographic materials over the Internet by unnamed John Does allegedly connected to the casinos. Id.

B. The Casino Control Act and CCC Regulations

The New Jersey Casino Control Act, N.J. Stat. Ann. § 5:12-1 et seq. (West 1996) (the "Act"), gives the CCC comprehensive authority to define and regulate the rules and conduct of play for blackjack and other authorized casino games. See Campione, 714 A.2d at 304; Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 445 A.2d 370, 372-73 (N.J. 1982). It also grants the CCC "exclusive jurisdiction" over the interpretation and enforcement [*14] of regulations governing "all matters

delegated to it or within the scope of its powers under the provisions of [the Act]." N.J. Stat. Ann. § 5:12-133b; see also id. 5:12-69, 70. That jurisdiction delegates to the CCC the power to promulgate regulations regarding the rules of casino games, including blackjack, id. §§ 5:12-69-70f, gambling related advertising, id. § 5:12-70o, and the enforcement of gaming regulations, including the investigation, adjudication, and punishment of regulatory violations, id. §§ 5:12-63b, f, g; id. § 5:12-64; id. § 5:12-129.

The regulations governing blackjack are exhaustive and set forth in great detail the rules for the conduct of the game. See N.J.A.C. § 19:47-2.1 et seq. Indeed, the New Jersey Supreme Court has stated that, "it is no exaggeration to state that the Commission's regulation of blackjack is more extensive than the entire administrative regulation of many industries." Uston, 89 N.J. 163, 445 A.2d 370. The CCC is very aware of the card-counter controversy. As the parties have recognized, the CCC carefully has considered and addressed in its regulatory capacity the effect card-counters can have on the game and the [*15] ways in which casinos should be permitted to respond to professional card-counters. See, e.g., 14 N.J. Reg. 467-70 (May 17, 1982); 14 N.J. Reg. 559-69 (June 7, 1982); 14 N.J. Reg. 841 (Aug. 2, 1982); 23 N.J. Reg. 1784 (June 3, 1991); 23 N.J. Reg. 2613 (Sept. 3, 1991); 23 N.J. Reg. 3350 (Nov. 4, 1991); 23 N.J. Reg. 3354 (Nov. 4, 1991); 25 N.J. Reg. 3953 (Sept. 7, 1993); 25 N.J. Reg. 5521 (Dec. 6, 1993). The CCC regulations authorize the casinos to use certain countermeasures to prevent card-counters from overcoming the statistical advantage that is necessary to ensure the casinos' financial viability.

The CCC adopted many of its regulations authorizing countermeasures in response to the New Jersey Supreme Court's ruling in Uston, 89 N.J. 163, 445 A.2d 370, a case considering whether casinos have the authority to exclude card-counters from their premises. The court determined that casinos were not authorized to exclude card-counters,

reasoning that the Act gave the CCC exclusive and plenary authority to set the rules and methods of play of casino games and that the CCC had not authorized the exclusion of card-counters as a countermeasure. n3 The court suggested, however, [*16] that if the CCC wanted to approve measures to neutralize the card-counter threat, it might be able to exclude card-counters, provided that the regulation did not violate constitutional or statutory limits. Uston, 445 A.2d at 375-76.

----------Footnotes----------

n3 It appears that prior to Uston the casinos on at least some occasions excluded card-counters and did so with "overwhelming force." See State v. Sanders, 185 N.J. Super. 258, 448 A.2d 481, 485 (N.J. Super. Ct. App. Div. 1982).

----------End Footnotes----------

Yet, prior to Uston, the CCC had codified a practice which the casinos used as a card-counter counter measure even though the CCC did not promulgate it for that purpose. This regulation provides that: "[a] casino licensee, in its discretion" may permit a player to "wager on [more than] one box at a Blackjack table." N.J.A.C. § 19:47-2.14. The CCC had been allowing the use of this practice against card-counters through its approval of casinos' internal control pursuant to N.J. Stat. Ann. § 5:12-99. The rule specifically grants [*17] casinos discretion to allow players (usually non-card-counters) to bet on more than one box, and presumably, in light of the discretionary language, allows them to preclude card-counters from betting on more than one box.

After Uston, the CCC held a series of hearings on the issue of card-counters and decided to enact regulations authorizing the casinos to use certain measures to neutralize the potential negative effect card-counters could have on their

financial viability. See Campione, 714 A.2d at 305. The new regulations, which the New Jersey Supreme Court urged the CCC to consider in lieu of allowing the casinos to exclude card-counters, balanced the statutory goals of casino viability and fair odds to all players. See N.J. Stat. Ann. § 5:12-100e. The CCC intended the regulations to ensure both the fairness and integrity of casino gambling and "the right of the casinos to have the rules drawn so as to allow some reasonable profit." Uston, 445 A.2d at 376; see also 14 N.J. Reg. 560-61 (June 7, 1982); 23 N.J. Reg. 1784 (June 3, 1991).

Several of these countermeasures involved the manner by which casinos could shuffle the blackjack cards. The first approved [*18] shuffling method is known as the "Bart Carter Shuffle," a "shuffling procedure in which approximately one deck of cards is shuffled after being dealt, segregated into separate stacks and each stack is inserted into premarked locations within the remaining decks contained in the dealing shoe." N.J.A.C. § 19:47-2.1; see also 14 N.J. Reg. 559 (June 7, 1982); 14 N.J. Reg. 841 (Aug. 2, 1982). The CCC also approved the "shuffle-at-will," which we have described above, to allow the casinos to shuffle after any round of play. To implement this approval, the CCC amended the existing shuffle regulation by adding language regarding the casinos' authority to shuffle "after each round of play":

> (a) Immediately prior to commencement of play, after any round of play as may be determined by the casino licensee and after each shoe of cards is dealt, the dealer shall shuffle the cards so that they are randomly intermixed.
>
> . . .

> (h) A reshuffle of the cards in the shoe shall take place after the cutting card is reached in the shoe . . . except that:
>
> 1. The casino licensee may determine after each round of play that the cards should be reshuffled;
>
> 2. When the 'Bart Carter Shuffle' is utilized [*19] a reshuffle shall take place after the cards in the discard rack exceed approximately one deck in number.

N.J.A.C. § 19:47-2.5; see 14 N.J. Reg. 559 (June 7, 1982), 14 N.J. Reg. 841 (Aug. 2, 1982).

The CCC also has approved the use of a device known as the continuous shuffling shoe. In place of the dealing and shuffling requirements set forth in N.J.A.C. 19:47-2.5 and 2.6, a casino licensee may utilize a dealing shoe or other device designed to reshuffle the cards automatically, provided that the CCC or its authorized designatee has approved such shoe or device and the procedures for dealing and shuffling the cards through the use of this device. See N.J.A.C. § 19:47-2.21; see also 14 N.J. Reg. 559 (June 7, 1982), 14 N.J. Reg. 841 (Aug. 2, 1982).

The shuffling regulations, particularly the most commonly used shuffle-at-will, have enabled the casinos to lessen the card-counters' ability to determine whether cards remaining in the shoe are player-favorable. As we already have noted, when the cards are reshuffled continuously or prior to the dealer reaching the cutting-card in the shoe, card-counters lose their potential advantage over the casinos because they no longer [*20] can increase their bets, secure in the knowledge that their chance of receiving player-favorable cards has been increased.

The CCC also authorized one non-shuffling countermeasure after the Uston decision--an increase in the number of decks casinos are allowed to use in blackjack play. See N.J.A.C. § 19:47-2.2. This change helped the casinos combat card-counters by increasing the number of cards card-counters would need to track to determine whether a shoe was player-favorable. Plainly, the more cards in the shoe, the more difficult a player's task is to keep track of the cards.

After the CCC authorized these initial counter measures, in 1991 it approved another regulation which provides that:

> [A] casino licensee may at any time change the permissible minimum or maximum wager at a table game, without notifying the Commission of such change, upon posting a sign at the gaming table advising patrons of the new permissible minimum or maximum wager and announcing the change to patrons who are at the table.

N.J.A.C. § 19:47-8.3(c); see also 23 N.J. Reg. 1784 (June 3, 1991); 23 N.J. Reg. 2613 (Sept. 3, 1991); 23 N.J. Reg. 3350 (Nov. 4, 1991); 23 N.J. Reg. 3354 (Nov. 4, 1991). [*21] This regulation gives the casinos the authority to lower the betting limit whenever it identifies a card-counter so that the card-counter will not be able to bet high when the shoe becomes player-favorable. Then, in 1993, the CCC made a further addition to its regulations which, as further amended in 1999, provides:

> (b) A casino licensee may offer:
>
> 1. Different maximum wagers at one gaming table for each permissible wager in an authorized game; and

> 2. Different maximum wagers at different gaming tables for each permissible wager in an authorized game.
>
> (c) A casino licensee shall provide notice of the minimum and maximum wagers in effect at each gaming table, and any changes thereto, in accordance with N.J.A.C. 19:47-8.3.
>
> (d) Notwithstanding (c) above, a casino licensee may, in its discretion, permit a player to wager below the established minimum wager or above the established maximum wager at a gaming table.
>
> (e) Any wager accepted by a dealer which is in excess of the established maximum permitted wager at that gaming table shall be paid or lost in its entirety in accordance with the rules of the game, notwithstanding that the wager exceeded the current table maximum or [*22] was lower than the current table maximum.

N.J.A.C. 19:47-8.2(b) to (e); see 25 N.J. Reg. 3953 (Sept. 7, 1993); 25 N.J. Reg. 5521 (Dec. 6, 1993). This regulation clarified that the casinos could limit specifically the wagers of only those patrons identified as card-counters, while permitting non-card-counters to continue betting at higher limits.

The New Jersey courts seem not to doubt the legality of the CCC-authorized countermeasures. In particular, the trial court in Campione recognized that the practice of "shuffling at will," the central concern in this case identified by the district court, is authorized by CCC regulation, see N.J.A.C. § 19:47-2.5, and affects all patrons, even those not counting cards, at a blackjack table. See Campione v. Adamar of N.J.,

Inc., 274 N.J. Super. 63, 643 A.2d 42, 50-51 (N.J. Super. Ct. Law Div. 1993), rev'd on other grounds, 302 N.J. Super. 99, 694 A.2d 1045 (N.J. Super. Ct. App. Div. 1997), mod. and aff'd, 155 N.J. 245, 714 A.2d 299 (N.J. 1998). Further, on appeal in Campione, the New Jersey Superior Court, Appellate Division, found that the CCC "authorizes the disparate treatment of card-counters. [*23] " 694 A.2d at 1050. The court noted that the CCC has approved the countermeasures allowing for betting limits and permitting casinos to vary the number of boxes in which particular players can wager. Id. at 1047. Finally, the New Jersey Supreme Court in Campione, while not expressly upholding the countermeasures the CCC has allowed, implicitly made it clear the CCC lawfully may permit such countermeasures. 714 A.2d at 305, 308.

II. JURISDICTION

The complaint in this action alleged violations of the United States Constitution, 42 U.S.C. § 1983, and the federal RICO statute, as well as causes of action under the New Jersey RICO statute, constitution and common law. Thus, the district court had jurisdiction under 28 U.S.C. §§ 1441, 1331, and 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

Our review of a district court's order of dismissal of a complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted, is plenary and we apply the same test as the district court. See Maio v. Aetna, Inc., 221 F.3d 472, 481 (3d Cir. 2000). [*24] Thus, "[a] motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Id. at 481-82. However, while our standard of review requires us to accept as true all factual allegations in the complaint, "we need not

accept as true 'unsupported conclusions and unwarranted inferences.' " City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998) (quoting Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997)). "Courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner." 147 F.3d at 263.

IV. DISCUSSION

A. RICO Claims

Appellants' first count alleges claims for racketeering under federal RICO, 18 U.S.C. § 1964(c), New Jersey RICO, N.J. Stat. Ann. § 2C: [*25] 41-4c (West 1995), and the RICO provisions of the Act, N.J. Stat. Ann. § 5:12-127c (West 1996). As appellees point out, the predicate acts of alleged racketeering on which appellants' base their RICO claims consist almost exclusively of the use of counter measures or alleged violations of other CCC regulations. In order to make out a RICO claim, appellants first must show that the casinos committed the predicate criminal acts enumerated by RICO. See, e.g., 18 U.S.C. §§ 1961, 1962. Appellants claim that the casinos committed the following predicate acts: shuffling-at-will when the count was player-favorable, using computer and video technology to assist in counting cards and identifying card-counters, denying comps to appellants, using shills, limiting plaintiffs to one hand of blackjack at a time, lowering betting limits, and failing to disclose the use and nature of the disputed countermeasures. See br. 30-41; Doug Grant, 3 F. Supp. 2d at 531-32. Based on the premise that these uses of authorized countermeasures and other alleged regulatory violations are criminal acts, appellants' complaint alleges that the casinos' operation of blackjack

violates [*26] criminal statutes regarding unlawful debt collection, transmission of gambling information, operation of illegal gambling business, and interstate commerce for an unlawful activity.

The district court believed that the primary purported predicate act on which appellants relied is the shuffling of cards when the count is favorable to the players. n4 The complaint alleges that use of the "shuffling-at-will" countermeasure constitutes a predicate act of racketeering because it violates the criminal casino "cheating" statute, N.J. Stat. Ann. § 5:12-115. The trial court in Campione rejected this precise claim. Campione, 643 A.2d at 51 ("labeling of the shuffling at will as 'cheating' is specious"). Moreover, despite appellants' protestations, the regulation itself makes clear that a casino at its discretion may shuffle at the conclusion of any round of play:

> (a) Immediately prior to commencement of play, after any round of play as may be determined by the casino licensee and after each shoe of cards is dealt, the dealer shall shuffle the cards so that they are randomly intermixed.
>
> . . .
>
> (h) A reshuffle of the cards in the shoe shall take place after [*27] the cutting card is reached in the shoe as provided in N.J.A.C. 19:47-2.6(1) except that:
>
> 1. The casino licensee may determine after each round of play that the cards shall be reshuffled.

N.J.A.C. § 19:47-2.5(a), (h).

----------Footnotes----------

n4 In their brief, the appellants contend that the district court was incorrect in this characterization, as their "central concern is the deceptive, unadvertised and clandestine use of countermeasures only when the cards favor players." See br. at 31. We will not linger on this point for two reasons. First, the casinos take their countermeasures quite openly. For example, it should be apparent to anyone at a table when the dealer shuffles before the cutting card is reached. Second, it seems clear that, as the district court recognized, the principal countermeasure is shuffling-at-will.

----------End Footnotes----------

Appellants attempt at length to skew the plain meaning of this regulation and the relevant regulatory history leading to its adoption to convince us that the CCC has authorized only a "random shuffle-at-will, [*28] " i.e., not a reshuffle that occurs only during player favorable counts. See br. at 33. Appellants' restrictive interpretation of the shuffle-at-will regulation, however, runs contrary to its express language.

The regulatory history makes clear that the CCC is fully aware of and allows the practice of shuffling-at-will when there is a player-favorable count as a countermeasure against card-counters. When the CCC published the proposed regulation to allow the casinos to shuffle-at-will, it noted that the casinos might shuffle when the count is favorable and that this practice might affect the odds of the game:

> The economic impact of this proposed amendment would vary depending on when in fact the cards were shuffled. For example, if the cards were always shuffled after the first round of play regardless of the point count,

> then the casino advantage against the basic strategy player and average player would probably remain the same with the advantage enjoyed by the card counter being decreased. If the cards, however, were only shuffled in positive point count situations and not in negative point count situations, the casino advantage against all types of players would increase. [*29]

14 N.J. Reg. 470 (May 17, 1982).

Appellants appear to take issue with the propriety of the shuffle-at-will regulation. But even assuming that in this action we should entertain a challenge to the regulation, we perceive nothing illegal in it. n5 In any event, even if the regulation is an improper exercise of the CCC's authority, a conclusion that we reject, a casino following it before its invalidation hardly could be subject to RICO liability for that conduct. In our view, a casino does not commit a predicate RICO act when it engages in conduct the CCC expressly permits.

----------Footnotes----------

n5 There have been numerous state administrative and judicial proceedings regarding the issues before us but it is difficult from the parties' briefs and appendix to discern their exact status. In any event, we do not find any state determination inconsistent with the result we reach. Significantly, the parties are in agreement that shortly after appellants filed this action, the individual appellants "filed a petition with the CCC with claims identical to those raised in the federal complaint." See appellants' br. at 4; appellees' br. at 5-6. In addition, the individual appellants later filed a declaratory petition with the CCC seeking its "interpretive ruling on provisions of the Act, blackjack regulations and casino practices that are at issue in this appeal." See

appellants' br. at 6; appellees' br. at 6. Apparently, appellants were not satisfied with the outcome of the declaratory petition, see 31 N.J. Reg. 555 (Feb. 16, 1999), as they have appealed from the determination to the New Jersey Superior Court, Appellate Division.

----------End Footnotes---------- [*30]

We are disturbed that appellants have couched their arguments in dramatic hyperbole obfuscating the real issues. Indeed, we are satisfied that the appellants have mischaracterized the facts. For instance, appellants characterize the use of the shuffle-at-will as "secretly removing cards from a blackjack game in progress." See br. at 30. But the reshuffle is hardly secret as the dealer does it openly in the view of the players. Moreover, a dealer reshuffling does not remove cards from the deck. Rather, the reshuffle simply places the cards in a different random order for the next hands.

Appellants further allege that the shuffle-at-will is a RICO criminal predicate act because it has a tendency to alter the normal random chance of the game. See br. at 32-39. What appellants fail to realize, however, is that the normal random chance of the game is defined pursuant to the statutory rules and CCC regulations. As the CCC has explained:

> The normal chance and random character of any casino game is necessarily defined and deter mined by the rules governing the conduct of the game. Since the Commission has the statutory authority to initially establish the rules of the game, N.J. [*31] S.A. § 5:12-100e and 70f, and primary jurisdiction to resolve any issues concerning interpretation of the Act and the rules promulgated thereunder, . . . it is absurd to allege that practices approved by the

> Commission as being consistent with its rules constitute 'cheating' under section 115 of the Act.

31 N.J. Reg. 556 (Feb. 16, 1999). While appellants may wish to have the CCC rethink the scope of the shuffle-at-will regulation, we are satisfied that after being stripped of its conclusory legal dressing, there is no allegation in the complaint regarding reshuffling sufficient to support a RICO claim against the casino defendants.

Appellants' other alleged predicate acts are similarly insufficient to support a RICO claim. The alleged violations of criminal statutes regarding unlawful debt collection, 18 U.S.C. § 1962, transmission of gambling information, 18 U.S.C. § 1084, interference with commerce by threats or violence, 18 U.S.C. § 1951, interstate commerce for unlawful activity, 18 U.S.C. § 1952, and operating an illegal gambling business, 18 U.S.C. § 1955, [*32] all derive from the allegations regarding the use of authorized countermeasures and other alleged but in fact nonexistent violations of the CCC regulations. Any debts allegedly "unlawfully collected" are those lost by players during blackjack games played in accordance with the CCC regulations. Any "illegal gambling business" or "unlawful activity in interstate commerce" is simply the play of blackjack as authorized by the CCC. Similarly, the casinos do not engage "in unlawful activity" or "operating an illegal gambling business" by not offering appellants or anyone else "comps," which are nothing more than free gifts from the casinos. While appellants claim that the casinos are obliged to offer "comps," in our view if they fail to do so they are not committing criminal acts in any way impacting on the integrity of the blackjack game. If appellants want to bring a judicial action to recover the value of "comps," surely their forum should be a New Jersey state court, at least in some instances the small claims part. Plainly, the casinos' activities of which appellants complain

do not constitute crimes and therefore are not predicate RICO acts.

Furthermore, appellants, although mentioning [*33] the use of "shills" in their complaint, have not made any allegations that the casinos violate the statutory prohibition of the use of "shills," i.e., persons who induce potential patrons to enter a casino or induce them to play any game. See N.J. Stat. Ann. § 5:12-1001 (West 1996). Certainly the casinos have not used shills to encourage appellants to play blackjack in their premises.

In their brief, appellants further assert that the CCC stated in an administrative proceeding that it would be deceptive for casinos actively to solicit a player to count cards in its casino without letting the player know that countermeasures will be used against those suspected of counting cards. See br. at 11, 25. Appellants, however, fail to cite the full text of the CCC's statement, which concluded:

> The Commission does not believe that any of the exhibits submitted by the commenters come even close to supporting an allegation of active solicitation of card counter play by a casino licensee.

31 N.J. Reg. 556 (Feb. 6, 1999). Thus, appellants' reference to the CCC's statement adds nothing to their allegation that the casinos' use of shills constitutes a RICO act.

Appellants also [*34] assert that it is deceptive for the casinos to fail to provide players with a complete text of the rules governing the play of blackjack. This allegation also fails to support a claim for relief. As we set forth above, the rules and regulations governing blackjack are numerous and thus they do not lend themselves to inclusion in a short manual. Further, the sample casino brochure in the appendix explaining blackjack on its face is not deceptive. See app. at

832-34. While it does not purport to set forth all of the blackjack rules, it does give the information needed by a player to play the game.

The appellants also allege that it is impermissible for the casinos to require one player's wager to be less than that of other players at the same table. See br. at 40 (citing N.J. Stat. Ann. § 5:12-100g (West 1996)). As we mentioned, however, the CCC has adopted a regulation that specifically allows casinos to set different wager limits, even among players at the same table, if a player is suspected of card counting. See N.J.A.C. § 19:47-8.2(b)-(d). As a result, the casinos cannot be said to have violated the Act in a manner to support a RICO cause of action. While appellants may wish [*35] to challenge the propriety of the regulation, they have not stated a RICO cause of action against the casinos whose actions are in compliance with the law and the CCC's regulations.

Appellants next argue that the casinos' failure to obtain prior approval for the countermeasures they implement constitutes a predicate act. See br. at 40-41. Yet appellants also recognize that the CCC has determined that the casinos do not need prior approval to implement the measures. See id. at 41. While the appellants note that that ruling is being challenged on appeal, it will be time enough for a federal court to consider the RICO implications if and when the CCC determines that the casinos' practices are illegal and the casinos do not comply prospectively with the CCC's determinations.

The only alleged predicate acts that are not based on CCC regulations are the allegations of assaults, threats, and stalking-in-person and via the Internet. Appellants allege that one appellant was knocked off his seat on one occasion, that some appellants were followed around casinos, and that one appellant was grabbed by the arm while being escorted out of a casino. However, these minor altercations cannot be regarded [*36] as conduct egregious enough to serve as

predicate acts sufficient to support what appellants apparently believe is massive litigation, in which, before trebling, they are seeking at least $ 347,532,800 in damages. See Doug Grant, 3 F. Supp. 2d at 522 n.1. Nor do the appellants' claims of receiving anonymous pornographic, offensive and threatening messages over the Internet from John Doe defendants constitute predicate acts attributable to the appellees, as appellants put forth no basis for concluding or even alleging that anyone associated with the casinos sent the messages. Accordingly, we will affirm the order of the district court dismissing the state and federal RICO causes of action.

For the reasons we have set forth, we have reached the conclusion that appellants' allegations that the casinos or any appellee has committed predicate RICO acts are completely insubstantial and border on the frivolous. In the circumstances, inasmuch as appellants have failed to allege any predicate act upon which to base a RICO claim, we need not determine conclusively whether appellants properly have pleaded injury to business or property as required for a RICO damages action. See [*37] 18 U.S.C. § 1964(c); N.J. Stat. Ann. § 2C:41-4c (West 1995); Maio, 221 F.3d at 483-84. Nevertheless, in this regard we do make the following observation which demonstrates why this action, which has generated a large record and required a considerable expenditure of time and no doubt money is, at bottom, at least with respect to the claims we have considered, a fatuity.

Unlike an ordinary RICO victim, in this case the allegedly injured plaintiffs, i.e., the players, can avoid any injury simply by walking away from the alleged wrongdoers, the casinos, by not playing blackjack in casinos. In fact, that is what the casinos apparently want them to do, at least as long as they count cards. While this abstention would deprive them of the opportunity to enrich themselves at the casinos' expense, surely it would be difficult to characterize that lost

speculative opportunity as an injury to "business or property." If the appellants have played blackjack in the past, aware of the casinos' countermeasures, and if they continue to play blackjack in the future in the hope of profiting by counting cards, they have suffered and will suffer self-inflicted wounds. [*38] Accordingly, at least with respect to individual players who are aware of the casinos' countermeasures, it is difficult to consider this case within a RICO formulation. n6

----------Footnotes----------

n6 In their brief, the casinos assert as an alter native ground for affirmance that the statute of limitations has run as to some of the appellants' claims. See br. at 14 & n.5. Appellants respond that they have alleged continuing violations that render their claims timely. See reply br. at 9. Appellants seem to overlook, however, that the corporate plaintiffs all ceased operations by 1992. See app. at 930-32. In the circumstances, inasmuch as appellants instituted this action in 1997, the corporate appellants' federal RICO claims are barred by the four-year RICO statute of limitations. See Forbes v. Eagleson, F.3d , 2000 U.S. App. LEXIS 25918, No. 99-1803, 2000 WL 1529852, at *10 (3d Cir. Oct. 17, 2000).

----------End Footnotes----------

B. Leave to Amend

The appellants originally pleaded a cause of action under the New Jersey Consumer Fraud Act, but omitted that claim in their [*39] amended complaint. In the district court, and here, they have asked permission to amend their complaint to reinclude the Consumer Fraud Act claim. The district court denied appellants leave to amend because it found that the Consumer Fraud Act claim was completely without merit and it would be futile to amend the complaint to

include a meritless claim. See Doug Grant, 3 F. Supp. 2d at 536-37.

As noted by the district court, the New Jersey Supreme Court recently has held that the Consumer Fraud Act does not apply to a heavily regulated industry to the extent that application of the statute would create a "real possibility" of conflict between the Consumer Fraud Act, as administered by the Division of Consumer Affairs, and the regulatory schemes of other administrative bodies. See Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 696 A.2d 546, 553 (N.J. 1997). Thus, the Consumer Fraud Act is inapplicable where "the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes. [*40] " 696 A.2d at 554.

Certainly the Casino Control Act evidences the New Jersey legislature's intent to vest in the CCC exclusive control of the regulation of casino gaming, including the content of related advertising. See N.J. Stat. Ann. § 5:12-133b (West 1996); id. § 5:12-70(o); see also Greate Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1232-33 (3d Cir. 1994). If we allowed claims such as the appellants' proposed consumer fraud claim to proceed in the district court, we would interfere with the CCC's regulatory scheme. The regulation of the game of blackjack, including shuffling-at-will and the advertisement regulations, is within the exclusive jurisdiction of the CCC. Moreover, the CCC has particularized expertise in these matters not possessed by courts and juries. While it is true that the Supreme Court of New Jersey in Campione, approving our opinion in Tose, see 714 A.2d at 307-08, held that the courts were not ousted of jurisdiction over common law damage claims against casinos merely because the claims arose from gambling transactions, this holding does not inform our result here on the very different question of the applicability of a different regulatory [*41] act to casino

operations with respect to running blackjack games. Thus, the district court properly denied appellants' motion for leave to amend for, as a matter of law, the amended complaint would not have stated a claim on which relief could be granted. See Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 190 (3d Cir. 1999), vacated on other grounds, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999).

In reaching our result on this point, we emphasize that the goals of the Consumer Fraud and the Casino Control Acts are not entirely consistent. The Consumer Fraud Act is concerned with the protection of consumers. The Casino Control Act, however, has dual purposes that must be balanced -- the protection of gambling patrons and the protection of the financial viability of the casino industry. N.J. Stat. Ann. § 5:12-1b (12) (West 1996). Thus, the Casino Control Act presupposes that the consumers as a group, i.e., the players, will lose their money, a contemplated result that hardly is the object of the Consumer Fraud Act.

C. Dismissal Against John Does with Prejudice

The sixth count of the complaint alleges various state and federal statutory [*42] claims against John Does for sending offensive messages and alleged threats over the Internet. But while the appellants in the complaint sought relief against the casino appellees for these acts, see app. at 104, they failed to offer any link between the John Does and the casinos. Thus, the district court properly dismissed this aspect of the complaint, though it did so with prejudice. We conclude, however, that the dismissal should have been without prejudice, allowing appellants to bring a claim at a later time if they uncover sufficient facts to permit them to plead facts supporting a conclusion that the casinos were responsible for these acts. Accordingly, we will vacate the order dismissing the sixth count with prejudice to the extent that it included claims relating to the sending of the offensive messages and threats over the Internet, and with respect to

that aspect of the order will remand the matter to the district court to modify the order so that it dismisses the count without prejudice.

D. Constitutional and Civil Rights Claims

Appellants' sixth count also alleges violations of the Equal Protection Clause, the Due Process Clause, Article 1, paragraph 1 of the New Jersey [*43] Constitution, and 42 U.S.C. § 1983. As the district court correctly noted, this count fails to state a claim upon which relief can be granted for several reasons. First, appellants' allegations of state action are insufficient. State regulation and the CCC's authorization of casino activities do not transform the casinos into state actors. See Uston v. Hilton Hotels Corp., 448 F. Supp. 116, 118 (D. Nev. 1978); State v. Sanders, 185 N.J. Super. 258, 448 A.2d 481, 486 (N.J. Super. Ct. App. Div. 1982) (search by casino employees does not constitute state action). It is well established that "mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." Blum v. Yaretsky, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 2786, 73 L. Ed. 2d 534 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51, 95 S. Ct. 449, 453-54, 42 L. Ed. 2d 477 (1974). Second, appellants have not suffered any equal protection clause violation inasmuch as under the rational basis test applicable for a [*44] non-protected class such as card-counters subject to CCC regulations, see Bally Mfg. Corp. v. New Jersey Casino Control Comm'n, 85 N.J. 325, 426 A.2d 1000, 1005 (N.J.) (casino regulations examined under rational basis test), appeal dismissed, 454 U.S. 804, 102 S. Ct. 77, 70 L. Ed. 2d 74 (1981), the countermeasures used by the casinos and authorized by the CCC are rationally related to the legitimate state interest in protecting the financial viability of the casino industry. See N.J. Stat. Ann. § 5:12-1b(12). Third, we are satisfied that the appellants do not have a constitutionally protected property interest in the

opportunity to gamble and thus the activities of which they complain do not violate their due process rights. Therefore, the district court properly dismissed the constitutional and civil rights claims in the sixth count of the complaint for failure to state a claim upon which relief can be granted. n7

----------Footnotes----------

n7 We hasten to add that we do not suggest that our holding means that the casinos have carte blanche in dealing with their patrons and they do not suggest otherwise. For example, both federal and state discrimination laws would be implicated if casinos discriminated among their patrons on the basis of their inclusion in protected groups.

----------End Footnotes----------[*45]

V. CONCLUSION

We have carefully considered all of appellants' arguments, including those that we may not have addressed specifically, and have concluded that the district court properly dismissed this action with prejudice with respect to the counts of the complaint that it addressed, except that it should have dismissed count six without prejudice to the extent that the count related to sending offensive messages and threats over the Internet. n8 Consequently, we will modify the order of dismissal to provide that count six partially is dismissed without prejudice, and we otherwise will affirm the order of dismissal with prejudice, and will affirm the order remanding the remaining aspects of the complaint to the Superior Court of New Jersey. We will remand the case to the district court to enter an order consistent with this opinion. Costs on this appeal will be taxed against appellants.

----------Footnotes----------

n8 Immediately before oral argument on this appeal, appellants filed a motion requesting "an evidentiary hearing on possible conflicts of interest of the district court" because of what appellants said were their "serious concerns" that the court "may have undisclosed conflicts of interest or financial interests." We have considered this application carefully and will deny the motion as we find it to be without merit. In any event, the appellants' "serious concerns" are quite immaterial, as we have exercised plenary review on all the issues on this appeal so that it would not matter if the appellants' concerns were justified. While we recognize that we review the denial of a motion for leave to amend on an abuse of discretion basis, here we are upholding the denial on the legal basis that the proposed amendment would not survive a motion to dismiss under Rule 12(b)(6). See Smith, 139 F.3d at 190. Thus, we have not deferred to the district court on any issue on which we have passed.

----------End Footnotes---------- [*46]

Copyright © 2000 LEXIS-NEXIS Group. All rights reserved.

APPENDIX D: OPINION OF THE UNITED STATES DISTRICT COURT ENTERED ON MAY 1, 1998

Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518 (D.N.J. 1998)

No. CIV. A. 97-4291, (JEI).

United States District Court,
D. New Jersey.

May 1, 1998.

* * *

*521 Howard A. Altschuler, Haworth, NJ, for Doug Grant, Inc., et al.

Barry & McMoran by Adam N. Saravay, John J. Barry, Newark, NJ, for Trump Casino, All Other Casino Defendants, Griffin Investigations.

Levine, Staller, Sklar, Chan, Brodsky & Donnelly, P.A. by John M. Donnelly, Atlantic City, NJ, for Casino Defendants (other than Trump Casino), Griffin Investigations.

Madden, Madden & Del Duca, by Damien O. Del Duca, Patrick J. Madden, Haddonfield, NJ, for F. Michael Daily, Ellen Barney Balint, Quinne, Dunne, Daily and Higgins, P.A.

Kelley, Wardell & Craig, LLP by John T. Kelley, Haddonfield, NJ, for Meranze & Katz.

Sterns & Weinroth, P.C. by Michael L. Rosenberg, Bart Q. Hollander, Trenton, NJ, for Caplan & Luber, Lloyd S. Markind, Richard L. Caplan, Sharon Morgan, Michele Davis.

OPINION

IRENAS, District Judge.

Plaintiffs, who are primarily card-counting blackjack players, bring this action against *522 thirty-eight casino defendants ("Casino Defendants"), three investigation agencies, and several hundred "John Doe" defendants, alleging a conspiracy in violation of state and federal RICO statutes, and violations of the New Jersey Public Accommodations Act and the New Jersey Consumer Fraud Act. In addition, they assert constitutional and civil rights claims implicating the Equal Protection Clause, the Due Process Clause, Article 1, paragraph 1 of the New Jersey Constitution, 42 U.S.C. § 1983 and other state and federal statutes, and various common law claims for breach of contract, fraud, tortious interference with contract and prospective economic advantage, and negligence. The complaint also asserts an assortment of personal injury claims. including invasions of privacy, misappropriation of name or likeness, libel, slander, and infliction of emotional distress. Finally, plaintiffs assert claims against nine lawyer and law firm defendants ("Lawyer Defendants") for legal malpractice, breach of fiduciary duty, negligence, breach of contract, and negligent supervision. [FN1] Jurisdiction over plaintiffs' federal statutory and constitutional claims is premised upon 28 U.S.C. § 1331. Jurisdiction over plaintiffs' remaining claims is based upon the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

> FN1. In addition to these broad and dramatic allegations, the complaint also reels back and forth, bursting at the seams, in its requests for damages and relief. In just one count, the complaint makes a prayer for: compensatory and consequential damages; punitive damages; injunctive remedies; treble damages; interest; costs of suit; attorneys' fees; the dissolution or reorganization of the alleged casino enterprise; the revocation of the charter of

corporate defendants organized under the laws of the State of New Jersey; the denial, suspension or revocation of the license of any foreign corporation; the denial, suspension or revocation of the license or permit granted to any casino by any department or agency of the State of New Jersey; a cease and desist order which specifies the acts and conduct which are to be discontinued, altered or implemented; the "restitution of all moneys or property unlawfully obtained or retained by defendants ..., including but not limited to the return of all bets placed by the plaintiffs, as well as the winnings plaintiffs would have realized for each bet had plaintiffs won the maximum pay-out available per bet;" and an assessment of civil monetary penalties against defendants to deter future violations, in an amount equal to three times the amount of the gain. Compl. at 76. Each of the other sixteen counts asks for similarly broad and sweeping monetary and injunctive relief, including prayers for a "return of all money the plaintiffs would have won had the blackjack game not been rigged, in an amount to be determined at trial, but conservatively estimated to be at least $347,532,800 for the last six years" and for "special damages for lost bets and income and expenses in an amount to be determined at trial." Compl. at 83, 86.

Currently before the Court are motions by all of the defendants to dismiss the plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(6). The defendants are also in the process of filing a motion for Rule 11 sanctions, Fed.R.Civ.P. 11, against plaintiffs' attorney and the lead plaintiff, Doug Grant von Reiman ("Doug Grant"), who claims to act as attorney-in-fact for the plaintiffs. We will reserve all issues relating to the Rule 11 sanctions for consideration at a later date. For the reasons that follow, we will grant the defendants' motions to dismiss under Fed.R.Civ.P. 12(b)(6)

as to the First Count, Second Count, Third Count, Fifth Count, Sixth Count, Seventh Count and Thirteenth Count. These counts are all based on the plaintiffs' central allegation that the casinos' implementation of Casino Control Commission ("CCC") regulations violates various federal and state statutes, the common law, and the United States and New Jersey Constitutions. After dismissing all these federal and related claims based on the CCC regulations, we decline to retain subject matter jurisdiction over the remaining state law claims alleged in the Eighth, Ninth, Tenth and Eleventh Counts and the state law malpractice claims against the Lawyer Defendants. Because these claims do not form part of the same case or controversy as the CCC regulation claims and because, in any case, we have discretion to decline to exercise supplemental jurisdiction, we will remand them to state court. As plaintiffs have withdrawn their claims under the Fourth and Eleventh Counts, we will also dismiss these claims.

I. BACKGROUND

The individual plaintiffs in this matter are blackjack players who frequent the Atlantic City casinos operated by the Casino Defendants. *523 [FN2] Most of them have developed card-counting skills which enable them to reduce or eliminate the normal odds in favor of the casinos. The corporate plaintiffs are corporations associated with plaintiff Doug Grant, Inc., a New Jersey corporation whose predecessor corporations were involved in operating card-counting schools and mock casinos set up by plaintiff and renowned card- counter Doug Grant. The complaint alleges that the schools and mock casinos were forced to close down in 1992 as the result of the Casino Defendants' alleged illegal countermeasures against card-counters and because of bomb threats, break-ins, destruction of property, theft of student lists, stalking and other intimidation tactics. Doug Grant, Inc. also provided the training for several cooperative player groups, including many plaintiffs, who

pooled their financial resources and agreed to share their blackjack winnings.

> FN2. The complaint alleges that only six of the sixty individual plaintiffs are not skilled card-counters. Compl. at ¶ 65.

A. The Play of Blackjack, Card-Counting and Shuffling-At-Will and Other Countermeasures

The gravamen of plaintiffs' complaint is that the Casino Defendants undertake certain "illegal" countermeasures to eliminate the advantage a skilled card- counter may be able to gain over the casinos in the game of blackjack. Blackjack is the one casino game in which a player's skill may increase his chance of winning to the point of eliminating the winning odds in favor of the "house." Card-counters use intellect and memory to identify when, during the course of play, the odds of winning are better or worse. A short discussion of Atlantic City blackjack and the practice of card-counting is necessary to assist the reader in better understanding the plaintiffs' allegations.

Blackjack must be played with decks containing fifty-two cards of four suits (hearts, diamonds, clubs and spades) with each suit containing thirteen cards (Ace, King, Queen, Jack, 10, 9, 8, 7, 6, 5, 4, 3, 2). N.J.A.C. 19:46-1.17. Before blackjack games are commenced, the dealer receives one or more, usually between six to eight, decks from the casino supervisor and inspects them in the presence of the floorperson. Id. 19:46-1.18(a), (f); id. 19:47-2.4(a). After the cards are inspected, the dealer takes them to his table and spreads them out in a fan, face upwards, for visual inspection by the first player or players to arrive at the table. Id. 19:47-2.4(b). After the first player or players is afforded an opportunity to visually inspect the cards, the cards are turned face downward on the table, mixed thoroughly, shuffled until "randomly intermixed," and then placed into a

stack. Id. 19:47-2.4(c); id. 19:47-2.5(a). After the shuffle is completed, the dealer asks the player seated at a certain position at the table, as defined by the regulations, id. 19:47-2.5(e), to cut the deck. Id. 19:47-2.5(b). The player cuts the deck by placing a plastic cutting card in the stack at least ten cards from either end. Id. 19:47-2.5(c). Once the cutting card has been inserted by the player, the dealer takes all the cards in front of the cutting card and places them at the back of the stack. Id. 19:47-2.5(d). The dealer then takes the entire stack of cards that was just shuffled and cut and aligns it along the side of the dealing shoe which has a mark on the side that enables the dealer to insert the cutting card so that it is in a position "at least approximately" one-quarter of the way from the back of the stack. Id. 19:47-2.5(d); see id. 19:46-1.19(d)(4). The stack of cards is then inserted into the dealing shoe for commencement of play. Id. 19:47-2.5(d). The cards behind the cutting card will not be used during the game. [FN3] Id. 19:47-2.5(h). The dealer then deals the cards to the players in a series of blackjack hands until the dealer reaches the cutting card. Once the cutting card is reached, the dealer repeats the shuffling *524 process and cutting procedures described above. Id.

> FN3. Plaintiffs allege that most blackjack players refuse to play if the dealer places the cutting card more than seventy–ninety cards from the back of the stack. The closer the cutting card is to the rear of the stack, the greater the card-counter's ability to determine whether the shoe is rich in player-favorable cards. Placing the cutting card closer to the front of the stack disadvantages the card counter, but also reduces casino profitability since more time-consuming shuffles will be needed. See infra at 7.

In the game of blackjack, where the object of play is to reach as close to a total card value of "21" without exceeding that value, certain cards are more favorable to the player and

certain cards are more favorable to the dealer. The player-favorable cards are the Ace, King, Queen, Jack and Ten. The dealer-favorable cards are the 6, 5, 4, 3, and 2. The 7, 8, and 9 are neutral. At any given point during the play of a shoe, the shoe might contain more player-favorable cards or it might contain more dealer-favorable cards. When there are more player-favorable cards, the players' chances of winning are increased. When there are more dealer-favorable cards, the dealer's chances of winning are increased. Whether and when a shoe will turn out to be player-or dealer-favorable is purely random.

Card-counters attempt to "count cards" so as to determine whether and when a shoe is player-favorable. They then vary their bets, betting high when the shoe is player-favorable and low when the shoe is dealer-favorable. Bets are placed before each individual round of blackjack and are generally based on the approved minimums and maximums for the table. According to the plaintiffs, successful card-counting contains several basic elements. These include: the assignment of a point value to each card, maintaining a running total of those points during play, betting strategies, playing strategies, money management, a sufficient bankroll, and "the intangible ability to consistently apply these interrelated strategies under fast-paced casino conditions." Compl. at ¶ 133.1.

In order to have the most success, card-counters need to be able to view, through the rounds of play, as many of the cards in the shoe as possible. The greater number of cards they are able to view, the easier it is for them to determine whether the remaining cards in the shoe are player-favorable or dealer-favorable. For this reason, card-counters prefer that the dealer places the cutting card toward the end of the shoe, leaving the fewest number of cards behind the cutting-card and increasing the overall number of cards in play. Card-counters also prefer to have the entire shoe of cards played. If the dealer decides to reshuffle prior to reaching

the cutting card, then the card- counters' opportunity to bet high on a shoe with a remainder of mostly player- favorable cards is eliminated. The casinos, on the other hand, prefer to decrease the card-counters' opportunity to bet high on a player-favorable shoe. Therefore, it is in their interest to decrease the card-counters' chances of determining whether a shoe is player-favorable by playing with fewer cards in the shoe (placing the cutting card as far away from the back of the stack as permitted by the regulations). It is also in the casinos' interest to reshuffle prior to reaching the cutting card when the remaining cards in a shoe are player-favorable. However, neither of these practices come completely free of cost to the casino: the more often the dealer must undertake the meticulous shuffling process, the shorter the actual time of play and the smaller the profits.

Plaintiffs allege that the casinos maintain their own card-counting teams and/or video and computer surveillance equipment to identify card- counters and inform the dealers of their participation in a blackjack game so that the dealers can take certain countermeasures against them. Plaintiffs challenge these practices as violations of the "cheating games" statute which provides that it shall be unlawful "knowingly to deal, conduct, carry on, operate or expose for play any game or games played with cards ... which have in any manner been marked or tampered with, or placed in a condition, or operated in a manner, the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game." N.J.S.A. 5:12-115. First, they claim that the identifying process is fundamentally flawed because it tends to unfairly misidentify non-card-counters as card- counters. They claim casinos define card-counters as (1) any patron who increases a bet during a player-favorable count, or (2) any patron who knows or is related to someone who has increased a bet during a player-favorable count. According to plaintiffs, once identified, that player is *525 "branded for

life" and never able to play a "fair" game of blackjack without being subjected to countermeasures. The casinos allegedly share information about suspected card-counters through defendant Griffin Investigations and other similar agencies. These agencies allegedly keep dossiers containing the pictures of suspected card-counters which casino employees then use to spot card-counters for purposes of knowing when to implement countermeasures.

Second, plaintiffs claim that the casinos utilize what they term the "cheating-at-will" preferential shuffle and which, as codified by the regulations, is generally known as the "shuffle-at-will." The shuffle-at-will occurs when the dealer is instructed to reshuffle prior to the cut-card marker because the casino card-counting team has determined that the shoe is player- favorable and card-counters are suspected to be playing at a given table. Plaintiffs allege that the shuffle-at-will provides an extra 2% advantage to the casino, nearly double the casinos' normal chance of winning, providing the casinos with a windfall of millions of dollars. They also claim that the shuffle-at-will can be abused and used to the disadvantage of non-card-counters because dealers and pit bosses can use it to increase their revenues even when there is no suspected card-counter playing at a table. Plaintiffs recount specific instances in which individual plaintiffs allegedly were subjected to shuffling-at-will by specific defendants throughout the past ten years. On some, but not all, of these occasions, the individual defendant would report the shuffle-at-will to the CCC and/or Department of Gaming Enforcement ("DGE") official required to be on-site at every casino. According to plaintiffs, no casino has ever responded to such complaints by admitting to counting cards and shuffling during a player-favorable count.

Third, plaintiffs, allegedly because they have been identified as card- counters, complain about being limited to one wager, being refused a deal, having bets pushed back, being

forced to bet below the original posted limit, and having "shills" [FN4] occupy all seats at tables at which they wished to play. They allege that they were treated in this manner while other non-card- counting players were not. Fourth, plaintiffs claim that the Casino Defendants denied them "comps" [FN5] after identifying them as card-counters. Finally, plaintiffs allege that they have been threatened, assaulted and stalked because of their suspected card-counter status. They allege that they have been threatened in person while at the casinos by both known and unknown casino employees and that they have been threatened and sent pornographic materials over the Internet by unnamed John Does allegedly connected to the casinos.

> FN4. "Shills" are persons used by the casinos to induce potential patrons to enter a casino or entice potential patrons to play any game. Use of "shills" is specifically prohibited by the Casino Control Act (the "Act"). N.J.S.A. 5:12-100(1). Plaintiffs misuse the term "shills." In fact, what they complain about is the use of "anti-shills," persons trying not to induce players to play a game but instead persons trying to prevent players from playing a game.

> FN5. "Comps" are complimentary services such as free goods, drinks, meals, parking, lodging transportation, and entertainment expenses which casinos are authorized, but not required, to provide patrons pursuant to N.J.S.A. 5:12-102(m).

B. The Casino Control Act and CCC Regulations

The Casino Control Act, N.J.S.A. 5:12-1 et seq. (the "Act"), gives the CCC comprehensive authority to define and regulate the rules and conduct of play for blackjack and other authorized casino games. See Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 169, 445 A.2d 370 (1982) (citing

N.J.S.A. 5:12-70f and 100e); see also Campione v. Adamar of N.J., 302 N.J.Super. 99, 113- 14, 694 A.2d 1045 (App.Div.1997), cert. granted, 152 N.J. 9, 702 A.2d 348 (1997). [FN6] It also grants the CCC *526 "exclusive jurisdiction" over the interpretation and enforcement of regulations governing "all matters delegated to it or within the scope of its powers under the provisions of [the Act]." N.J.S.A 5:12-133(b); see id. 5:12-69 to 70. Among the matters that the Act delegates to the CCC are the promulgation of regulations regarding the rules of casino games, including blackjack, id. 5:12-69, 70(f), gambling related advertising, id. 5:12-70(o), and the enforcement of gaming regulations, including the investigation, adjudication, and punishment of regulatory violations, id. 5:12-63(b), (f), (g); 5:12-64; 5:12-129.

FN6. Uston and Campione are the seminal cases addressing the battle between the Atlantic City casinos and blackjack card-counters. The New Jersey Supreme Court in Uston determined that the casinos could not exclude card-counters from their premises, as the CCC had not authorized exclusion of card-counters. Uston, 89 N.J. at 166, 445 A.2d 370. The Court also held that the Act gives the CCC exclusive and plenary authority "to set the rules of licensed casino games, which includes the methods for playing those games." Id. at 166, 445 A.2d 370.

Campione, which is currently before the New Jersey Supreme Court, addressed many of the same issues raised in this complaint. Specifically, it dealt with the issue of which countermeasures, short of exclusion, the casinos could utilize to neutralize the threat posed by card-counters. In Campione, the plaintiff, Mr. Campione, a skilled card-counter, alleged that he was treated in a discriminatory manner by the casinos in their implementation of certain CCC regulations. He claimed that Tropworld, the casino in which he most frequently played blackjack,

engaged in practices of shuffling-at-will, lowering the maximum betting limit and restricting him to playing only one hand. He maintained that Tropworld would allow other players at the same table to bet above the maximum limit, to play more than one hand, and to play against the dealer one-on-one, while prohibiting him from doing the same. More specifically, Campione alleged that on one occasion, he was playing and card-counting at a Tropworld table with a minimum bet of $25 and a maximum bet of $1000, when he placed a $350 bet in the betting circle. Immediately, the casino floor supervisor, who was also a member of the casino's card-counting team, instructed the dealer to change the betting-limit sign. Campione was told that he could bet only $100, while the other player at the table was told he could bet up to $1000. The dealer began dealing and pushed Campione's money out of the betting circle. Campione pushed his money back into the circle. Play began and Campione received a ten or an eleven and sought to "double down" his bet by betting an additional $350. He next received a nine or a ten, winning the hand. The casino payed him only $200, $100 for each of his two bets, instead of the $700 to which Campione believed he was entitled. A confrontation between Campione and the floor supervisor and the CCC and DGE representatives ensued, but Campione never received further money. See generally, Campione v. Adamar of N.J., 274 N.J.Super. 63, 643 A.2d 42 (Law Div.1993); Campione, 302 N.J.Super. 99, 694 A.2d 1045.

The trial court in Campione granted summary judgment to Tropworld as to its right to shuffle-at-will, but allowed Campione's cause of action for discrimination to proceed to trial. Campione, 274 N.J.Super. at 83, 643 A.2d 42. The jury awarded Campione $1,519,873.43. Campione, 302

N.J.Super. at 102, 694 A.2d 1045. The appellate court reversed the verdict, holding that the claim never should have been heard in court since the CCC has exclusive jurisdiction over claims regarding casino implementation of CCC regulations and therefore no private right of action existed. Campione, 302 N.J.Super. at 110-18, 694 A.2d 1045. The appellate court also determined that the actions taken by Tropworld were specifically permitted by the CCC regulations. Id. at 103, 694 A.2d 1045. Finally, it found that the CCC authorized the disparate treatment of card-counters. Id. at 110, 694 A.2d 1045.

The Supreme Court granted certification on October 7, 1997. Campione, 152 N.J. 9, 702 A.2d 348 (1997). Briefs were submitted on behalf of the parties and by the CCC and DGE. Oral argument, including comments by the CCC and DGE supporting the practices authorized by the CCC regulations and used against Campione, was held on March 16, 1998. No opinion has yet been issued.

The regulations governing blackjack are exhaustive and set forth in great detail the rules for the conduct of the game. See N.J.A .C. 19:47-2.1 et seq. As recognized by the New Jersey Supreme Court, "[i]t is no exaggeration to state that the Commission's regulation of blackjack is more extensive than the entire administrative regulation of many industries." Uston, 89 N.J. at 169, 445 A.2d 370. The CCC is very aware of the card-counter controversy. As both plaintiffs and defendants have recognized, the CCC has carefully considered and addressed in both proposed and adopted blackjack regulations the effect card-counters can have on the game and the ways in which casinos should be permitted to respond to professional card-counters. See, e.g., 14 N.J.R. 467-70 (May 17, 1982); 14 N.J.R. 559-69 (June 7, 1982); 14 N.J.R. 841 (Aug. 2, 1982); 23 N.J.R. 1784(b) (June 3, 1991); 23 N.J.R. 2613(a) (Sept. 3, 1991); 23 N.J.R. 3350 (Nov. 4,

1991); 23 N.J.R. 3354 (Nov. 4, 1991); 25 N.J.R. 3953(a) (Sept. 7, 1993); 25 N.J.R. 5521(a) (Dec. 6, 1993). The CCC regulations authorize the casinos to use certain countermeasures to prevent professional card-counters from overcoming the statistical advantage that is necessary to ensure the casinos' financial viability.

The adoption of many of the CCC regulations authorizing countermeasures occurred in response to the New Jersey Supreme *527 Court's ruling in Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 445 A.2d 370 (1982). At issue in Uston was whether or not casinos had the authority to exclude card-counters from their premises. The Court determined that casinos were not authorized to exclude card-counters. It reasoned that the Act gave the CCC exclusive and plenary authority to set the rules and methods of play of casino games and that the CCC had not authorized exclusion as a countermeasure. Id. at 166, 445 A.2d 370. The Court suggested that, if the CCC wanted to approve measures to neutralize the card-counter threat, regulations to that effect, short of violating possible constitutional and statutory limits by fully excluding card-counters altogether, could be adopted. Id. at 372, 375-76. In fact, prior to Uston, the CCC had already codified a practice originally not intended as a card-counter countermeasure but eventually used by the casinos for that purpose. This regulation provided that: "[a] casino licensee may permit a player to wager on more than one box at a Blackjack table." N.J.A.C. 19:47-2.14. [FN7] The CCC had been allowing the use of this practice against card-counters through its approval of casinos' internal Section 99 controls. See N.J.S.A. 5:12-99. [FN8] The rule specifically offered casinos' discretion to allow players (usually non-card-counters) to bet on more than one box, and presumably, in light of the discretionary language, allowed them not to permit card-counters to bet on more than one box. [FN9]

FN7. This 1978 regulation also provided that the CCC

could prohibit a casino from allowing patrons to wager on more than one box at a blackjack table. The CCC felt it needed this authority, because in 1978 there was only one casino in Atlantic City, and it wanted to ensure that, when the blackjack tables were crowded, as many players as possible were given the opportunity to play. This language was deleted in 1991. See 23 N.J.R. 1784(a) (June 3, 1991); 23 N.J.R. 2869(b) (Sept. 16, 1991).

The Appellate Division in Campione seems to have been under the impression that N.J.A.C. 19:47-2.14, authorizing the casinos to permit a player to wager on more than one box, was also adopted as part of the cardcounter countermeasures adopted in 1982 subsequent to the Uston decision. See Campione, 302 N.J.Super. at 103, 694 A.2d 1045. However, N.J.A.C. 19:47-2.14 was adopted well before Uston, and was originally not intended as a countermeasure despite the fact that eventually it was used by the casinos for that purpose.

FN8. Section 99 controls are a broad set of internal practices which casinos use to implement the CCC regulations in all areas of casino operation. As part of their Section 99 controls, casinos are required to provide the CCC with all of the practices they utilize to combat card- counters. If the CCC determines that any of these practices violate the regulations, it will not approve the offending casino's Section 99 controls.

FN9. The CCC's attorneys have taken the position that because the regulation affords the casinos discretion to permit a player to wager on more than one box, they likewise have discretion not to permit a player to wager on more than one box. See Unofficial Transcript of Oral Argument in Campione, 152 N.J. 9,

> 702 A.2d 348, (March 16, 1998), Exh., 6 to Pl. Rule 11 Br. Although the CCC has never officially ruled on the issue and claims that the regulation was not originally aimed at card-counters, it is aware of how the regulation is used and it has left the regulation in place. See id. Similarly, the CCC approves the casinos' internal Section 99 controls which permit casinos to allow one player to wager on more than one box but to prohibit another player from so doing. See id. at 15; CCC Br. to New Jersey Supreme Court in Campione, Exh. H to Casino Defendants Reply Br. at 6.

After Uston, the CCC held a series of hearings on the issue of card- counters and decided to enact regulations authorizing certain measures casinos could use to neutralize the potential negative effect card-counters could have on their financial viability. See Campione, 302 N.J.Super. at 103, 694 A.2d 1045. The new regulations, which the New Jersey Supreme Court urged the CCC to adopt in lieu of allowing the casinos to exclude card-counters, balanced the statutory goals of casino viability and fair odds to all players, N.J.S.A. 5:12-100e, and were intended to ensure both the fairness and integrity of casino gambling and "the right of the casinos to have the rules drawn so as to allow some reasonable profit." Uston, 89 N.J. at 175, 445 A.2d 370; see, e.g., 14 N.J.R. 560-61 (June 7, 1982); 23 N.J.R. 1784 (June 3, 1991).

Several of these countermeasures involved the manner in which casinos could shuffle the blackjack cards. The first approved shuffling method was known as the "Bart Carter Shuffle," a "shuffling procedure in which approximately one deck of cards is shuffled after being dealt, segregated into separate *528 stacks and each stack is inserted into premarked locations within the remaining decks contained in the dealing shoe." N.J.A.C. 19:47-2.1; see N.J.R. 559(b) (June 7, 1982); 14 N.J.R. 841(b) (Aug. 2, 1982). Another approved shuffling countermeasure, known as the

"shuffle-at-will," was approved by the CCC to allow the casinos to shuffle after any round of play. The CCC amended the existing shuffle regulation by adding language regarding the casinos' ability to shuffle "after any round of play:"

> (a) Immediately prior to commencement of play, after any round of play as may be determined by the casino licensee and after each shoe of cards is dealt, the dealer shall shuffle the cards so that they are randomly intermixed...
> (h) A reshuffle of the cards in the shoe shall take place after the cutting card is reached in the shoe ... except that:
> 1. The casino licensee may determine after each round of play that the cards should be reshuffled;
> 2. When the "Bart Carter Shuffle" is utilized a reshuffle shall take place after the cards in the discard rack exceed approximately one deck in number.

N.J.A.C. 19:47-2.5 (emphasis added); see 14 N.J.R. 559(b) (June 7, 1982), 14 N.J.R. 841(b) (Aug. 2, 1982).

Finally, the use of a device known as the continuous shuffling shoe was approved:

> In lieu of the dealing and shuffling requirements set forth in N .J.A.C. 19:47-2.5 and 2.6, a casino licensee may utilize a dealing shoe or other device designed to automatically reshuffle the cards provided that such shoe or device and the procedures for dealing and shuffling the cards through the use of this device are approved by the Commission or its authorized designee.

N.J.A.C. 19:47-2.20; see 14 N.J.R. 559(b) (June 7, 1982), 14 N.J.R. 841(b) (Aug. 2, 1982).

The shuffling regulations, particularly the most commonly used shuffle-at- will, enabled the casinos to lessen the card-counters' ability to determine whether cards remaining

in the shoe were player-favorable. As already noted, when the cards are reshuffled continuously or prior to reaching the cutting- card, card-counters lose their potential advantage over the casinos because they can no longer begin betting high wagers only when they know their chances of receiving player-favorable cards have been increased. Though effective against card-counters, the use of these shuffling regulations increases shuffling time and thereby causes the casinos to lose revenue.

The CCC also authorized one non-shuffling countermeasure after the Uston decision--an increase in the number of decks casinos were allowed to use in blackjack play. N.J.A.C. 19:47-2.2. This helped the casinos combat card- counters by increasing the number of cards card-counters would have to be able to track in order to determine whether a shoe was player-favorable.

After these initial countermeasures were authorized, the CCC in 1991 approved another regulation which provided that:

> a casino licensee may at any time change the permissible minimum or maximum wager at a table game, without notifying the Commission of such change, upon posting a sign at the gaming table advising patrons of the new permissible minimum or maximum wager and announcing the change to patrons who are at the table.

N.J.A.C. 19:47-8.3(c); see 23 N.J.R. 1784(b) (June 3, 1991); 23 N.J.R. 2613(a) (Sept. 3, 1991); 23 N.J.R. 3350(a) (Nov. 4, 1991); 23 N.J.R. 3354(c) (Nov. 4, 1991). This gave the casinos the ability to automatically lower the betting limit whenever it identified a card-counter playing at one of its tables so that the card-counter would not be able to bet high when the shoe became player-favorable. Then, in 1993, one further addition was made:

> (b) A casino licensee may offer:

1. Different maximum wagers at one gaming table for each permissible wager in an authorized game; and
2. Different maximum wagers at different gaming tables for each permissible wager in an authorized game.

(c) A casino licensee shall provide notice of the minimum and maximum wagers in effect at each gaming table, and any changes *529 thereto, in accordance with N.J.A.C. 19:47-8.3.

(d) Any wager accepted by a dealer which is in excess of the established maximum permitted wager at that gaming table shall be paid or lost in its entirety in accordance with the rules of the game, notwithstanding that the wage exceeded the current table maximum.

N.J.A.C. 19:47-8.2(b)-(d); see 25 N.J.R. 3953(a) (Sept. 7, 1993); 25 N.J.R. 5521(a) (Dec. 6, 1993). This regulation clarified that the casinos could specifically limit the wagers of only those patrons identified as card- counters, while permitting non-card-counters to continue betting at higher limits.

The New Jersey courts have recognized the legality of the CCC-authorized countermeasures. In particular, they have recognized that the practice of "shuffling at will," the central concern of plaintiffs' 157 page complaint, is authorized by the CCC regulations, N.J.A.C. 19:47-2.5, and affects all patrons, even those not counting cards, at a blackjack table. See Campione, 274 N.J.Super. 63, 79-80, 643 A.2d 42 (Law Div.1993), rev'd, 302 N.J.Super. 99, 694 A.2d 1045 (App.Div.1997), cert. granted, 152 N.J. 9, 702 A.2d 348. Further, the Appellate Division in Campione, 302 N.J.Super. at 110, 694 A.2d 1045, found that the CCC "authorizes the disparate treatment of card- counters." It noted that the countermeasures allowing betting limits and permitting casinos to vary the number of boxes which particular players can wager on have all been approved by the CCC. Id. at 103, 694 A.2d 1045. Most important, the Appellate Division ruled that "there is no private cause of action against a casino for its alleged violation of [CCC] regulations governing the

manner in which games are played." Id. at 118, 694 A.2d 1045. Even prior to the Campione ruling, this Court had suggested in a footnote that no cause of action exists against casinos for alleged violations of the Act or CCC regulations. Tose v. Greate Bay Hotel and Casino Inc., 819 F.Supp. 1312, 1316-17 n. 8 (D.N.J.1993), aff'd, 34 F.3d 1227 (3d Cir.1994). The Third Circuit has subsequently agreed with our view, holding in Hakimoglu v. Trump Taj Mahal Associates, 70 F.3d 291, 293-94 (3d Cir.1995), what we suggested in Tose: that where the Act and CCC regulations do not expressly authorize imposing liability on a casino for conduct clearly within the ambit of the detailed casino regulations, no private cause of action exists.

C. CCC Complaint Mechanism

The CCC's regulatory enforcement powers include the authority to receive complaints about violations of CCC regulations, to investigate such complaints, and to hold hearings. N.J.S.A. 5:12-63(b), (f), (g); id. 5:12-66. The CCC also has the power to penalize casinos for regulatory violations by issuing reprimands, imposing monetary civil penalties, and even revoking licenses. Id. 5:12-64 to 129. The CCC can also require a casino to make restitution to a complainant. Id. 5:12-129(6). If, at the end of this enforcement process, a complainant is not satisfied, the complainant may appeal the CCC's determination to the Appellate Division. Id. 52:14B-12.

D. Lawyer Defendants

The Lawyer Defendants gave plaintiffs varying degrees of advice with respect to the claims alleged in this complaint and possible other claims related to the same set of facts. Plaintiffs now allege malpractice claims, essentially stemming from the loss of potential claims due to various statutes of limitations. They also assert claims against the Quinne, Dunne, Dailey & Higgins defendants for failure to

assist plaintiffs in receiving a portion of the judgment in the test case of Campione, [FN10] with which plaintiffs allege they were associated.

> FN10. As noted earlier, see supra note 6, the verdict in Campione was reversed by the Appellate Division, 302 N.J.Super. 99, 694 A.2d 1045, and is currently pending before the Supreme Court.

E. Procedural History

Plaintiffs initiated this action by filing a 74-page single-spaced complaint in the Superior Court of New Jersey, Middlesex County, on July 18, 1997. On August 6, 1997, plaintiffs filed a petition with the CCC setting forth the identical claims. By letter dated *530 August 20, 1997, the CCC responded that no action would be taken on plaintiffs' petition pending the New Jersey Supreme Court's consideration of the Petition for Certification in Campione. See Campione, 302 N.J.Super. 99, 694 A.2d 1045, cert. granted, 152 N.J. 9, 702 A.2d 348. On August 28, 1997, defendants removed the case to this Court.

Prior to the initial scheduling conference, counsel for the Casino Defendants met with plaintiffs' counsel in an effort to narrow the issues raised in the complaint. That effort was formalized as part of the Management Order issued by Magistrate Judge Joel B. Rosen on November 6, 1997. As directed by that order, the defendants provided plaintiffs with a letter, dated November 6, 1997, describing their position as to why the complaint should be withdrawn ("Rule 11 Letter"). In response, plaintiffs filed a 157-page one-and-a-half spaced amended complaint [hereinafter "complaint"], which omitted the antitrust, Fair Credit Reporting Act, and Consumer Fraud Act [FN11] claims contained in the original complaint but added several constitutional and civil rights claims as well as allegations regarding the transmission of threatening and pornographic

messages over the Internet.

FN11. In their reply brief, plaintiffs, without leave of court, reassert their Consumer Fraud Act claim.

II. DISCUSSION

A. Standard of Review

[1] Fed.R.Civ.P. 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." In considering a Rule 12(b)(6) motion, the court will accept the allegations of the complaint as true. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Dismissal of claims under Fed.R.Civ.P. 12(b)(6) should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Although the court must assume as true all facts alleged, "[i]t is not ... proper to assume that the [plaintiff] can prove any facts that it has not alleged." Associated General Contractors of Calif., Inc., v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Finally, when "[c]onfronted with [a 12(b)(6)] motion, the court must review the allegations of fact contained in the complaint; for this purpose the court does not consider conclusory recitations of law." Commonwealth of Pennsylvania v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir.1988) (emphasis added).

B. Fed.R.Civ.P. 8(a)

[2] Fed.R.Civ.P. 8(a) provides that "[a] pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). All the Rule requires is a short and plain statement of the claim that will give the defendants fair

notice of what the plaintiff's claim is and the grounds upon which it rests. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

Tipping the scales at nearly 157 pages, the complaint hardly comports with principles of brevity. As this Court has previously noted, "[t]he length of the Complaint might not be deserving of criticism were all of it necessary." See Simmerman v. Corino, 804 F.Supp. 644, 648 (D.N.J.1992), aff'd, 16 F.3d 405 (3d Cir.1993). In addition to being overly long, the complaint is inconsistent and confusing, causing this Court to expend much valuable time in an effort to discern its meaning. While the allegations regarding the so-called "cheating-at-will" preferential shuffle are very specific and repetitive, the legal basis for this claim "seems to float free from its moorings and drift into a swirl of dramatic" and largely irrelevant contentions of perceived violations of the CCC regulations. Id. On the other hand, the allegations that defendants violated plaintiffs' constitutional rights, statutory civil rights, and various common law tort principles are vague, ambiguous and clearly insufficient to provide proper notice to allow defendants to adequately respond to the complaint and prepare for trial. There is a strong argument *531 that portions of the complaint fail to comply with the strictures of Fed.R.Civ.P. 8(a) and might afford this Court a sufficient basis for dismissal. [FN12] However, a dismissal without prejudice under Fed.R.Civ.P. 8(a) would only lead to a new filing and needlessly increase the amount of time and money already expended. Thus, the Court will plunge into the complaint's "Serbonian Bog" [FN13] and deal with the pending Fed.R.Civ.P. 12(b)(6) motions on the merits.

FN12. The heart of plaintiffs' case is whether the Act authorizes the CCC to adopt the four or five countermeasures used by the casinos to frustrate card-counters, particularly the countermeasures which treat card-counters differently from other

blackjack players. These could have been placed at issue in a clearly drafted complaint of no more than ten to fifteen pages.

FN13. John Milton, Paradise Lost, Bk. II, lines 591-94; see also Eugene M. Haring, Drug Abuse and Accidental Death Benefits: Hard Drugs and Hard Cases, 8 FORUM 45 n. 17 (1972).

Plaintiffs' wide-ranging and often diverse claims in the complaint naturally fall into two categories: those based on alleged violations of the CCC regulations and those based on unrelated and separable state common law claims such as personal injury, invasion of privacy, defamation, and attorney malpractice. Our original jurisdiction over this matter is based entirely upon federal questions raised in some of those claims based on alleged violations of the CCC regulations. The CCC regulation claims are in the First, Second, Third, Fifth, Sixth, Seventh Counts and in a claim not included in the complaint which plaintiffs now seek leave to add. The remaining claims, although claimed to be within our supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a), are separable from the CCC regulation claims if they do not arise from a common nucleus of operative fact and thus fail to form part of the same case or controversy for purposes of supplemental jurisdiction. 28 U.S.C. § 1367(a); see United Mine Workers v. Gibbs, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); Simmerman v. Corino, 804 F.Supp. 644, 658 (D.N.J.), aff'd, 16 F.3d 405 (3d Cir.1993). Under 28 U.S.C. § 1367(c)(3), we also have discretion to decline jurisdiction over any and all pendent state law claims once all federal claims have been dismissed. See Kessel v. B.A.T. Indus., P.L.C., 964 F.Supp. 164 (D.N.J.1997) (once federal RICO claim was dismissed, district court declined supplemental jurisdiction over state common law fraud, civil conspiracy, negligence and negligent misrepresentation claims); Ifert v. Miller, 138 B.R. 159 (E.D.Pa.1992) (once federal RICO claim was dismissed,

district court declined supplemental jurisdiction over state common law contract, fraud, and tortious interference claims), aff'd 981 F.2d 1247 (3d Cir.1992); Freund v. Florio, 795 F.Supp. 702 (D.N.J.1992) (once Fourteenth Amendment challenges were dismissed, district court would not retain supplemental jurisdiction over pendent claims under New Jersey Constitution). Because our ability to adjudicate plaintiffs' complaint hinges on the survival of the CCC regulation claims, we must first address the merits of these claims. We will then consider whether we should decline to exercise supplemental jurisdiction over the marginally-related state law claims contained in the Eighth. Ninth, Tenth and Eleventh Counts and the malpractice claims against the Lawyer Defendants.

C. RICO Claims

[3][4] Plaintiffs' First Count alleges claims for racketeering under federal RICO, 18 U.S.C. § 1964(c), New Jersey RICO, N.J.S.A. 2C:41-4(c), and the Act RICO. N.J.S.A. 5:12-127(c). As defendants point out, the predicate acts of alleged racketeering on which plaintiffs' RICO claims are based consist almost exclusively of the use of countermeasures or alleged violations of other CCC regulations. In order to make out a RICO claim, plaintiffs first must show predicate criminal acts undertaken by the defendants which are prohibited by the RICO statute at issue. See, e.g., 18 U.S.C. § 1961, 1962. Plaintiffs claim the Casino Defendants committed the following predicate acts: shuffling-at-will when the count was player-favorable, using computer and video technology to assist in counting cards and identifying card-counters, denying comps to plaintiffs, using shills, limiting plaintiffs to one hand of *532 blackjack at a time, and lowering betting limits. Based on the premise that these uses of authorized countermeasures and other alleged regulatory violations are criminal acts, plaintiffs' complaint alleges that the casinos' operation of blackjack violates criminal statutes regarding unlawful debt collection, transmission of

gambling information, operation of illegal gambling business, and interstate commerce for an unlawful activity.

[5] The primary purported predicate act is the shuffling of cards when the count is favorable to the player, an act which several courts, including this Court, have held is legal. See Hyland v. Griffin Investigation, Civ. A. No. 95-223 (1996), Exh. A to Casino Defendants Br. The complaint alleges that use of the "shuffling-at-will" countermeasure constitutes a predicate act of racketeering because it violates the criminal casino "cheating" statute, N.J.S.A. 5:12-115. The trial court in Campione rejected this precise claim. Campione, 274 N.J.Super. at 80, 643 A.2d 42 ("labeling of the shuffling at will as 'cheating' is specious"). We agreed with the trial court's Campione holding in our opinion in Hyland. See Hyland, Civ. A. No. 95-223, at 19-20. Moreover, the language of the regulation itself makes clear that the casino may shuffle at the conclusion of any round of play, at its discretion:

> (a) Immediately prior to commencement of play, after any round of play as may be determined by the casino licensee and after each shoe of cards is dealt, the dealer shall shuffle the cards so that they are randomly intermixed.
> (h) A reshuffle of the cards in the shoe shall take place after the cutting card is reached in the shoe as provided in N.J.A.C. 19:47-2.6(1) except that: 1. The casino licensee may determine after each round of play that the cards shall be reshuffled.

N.J.A.C. 19:47-2.5(a), (h) (emphasis added).

Plaintiffs attempt at length to skew the logical interpretation of this statute and the relevant regulatory history leading to its passage in order to convince us that the CCC has authorized only a "random shuffle-at-will." [FN14] As the Casino Defendants point out, plaintiff' suggestion of the "random shuffle-at-will" is an oxymoron, one which the CCC never intended to impose on the casinos.

FN14. Not only have plaintiffs devoted a large portion of their brief in opposition to the Fed.R.Civ.P. 12(b)(6) motions to attempt to negate the plain language of the shuffle-at-will regulations by parsing regulatory and legislative history, but recently they have requested in their brief in response to the defendants' Rule 11 motions that this Court consider three new events they claim support their proposition that the CCC never authorized the shuffle-at-will. They now claim that comments made by the CCC and DGE during the course of various recent legal proceedings support their position. They rely on (1) CCC and DGE comments made during oral argument before the New Jersey Supreme Court in Campione, Unofficial Transcript of Oral Argument in Campione, 152 N.J. 9, 702 A.2d 348, (March 16, 1998), Exh. 6 to Pl. Rule 11 Br., (2) comments made by the CCC in a motion to dismiss an appeal taken by one of the plaintiffs to the New Jersey Appellate Division appealing a CCC letter stating that a casino had not violated any regulation by shuffling-at-will, In re: Patron Complaint P98-0222 (Karen Dwyer), Exh. 8 to Pl. Rule 11 Br., and (3) a letter written by a CCC legal analyst which states that shuffling-at-will is permitted by the CCC regulations but that the CCC has no regulations addressing the so- called "preferential shuffle." Letter from CCC Legal Analyst Kenneth Doss to Martin Rose re: Patron Complaint P98-0299 (March 27, 1998), Exh. 9 to Pl. Rule 11 Br. While we are unable to determine from the documents submitted by the plaintiffs whether or not comments made by outside counsel and an in-house legal analyst reflect official positions held by the CCC or DGE (in fact the CCC legal analyst's letter explicitly states that "opinions set forth herein are those of the Commission staff and are not binding upon the Commission"), we are not at all persuaded

by plaintiffs' view of the import of these various isolated comments. We feel that, if anything, the comments support our view of the shuffle-at-will regulations.

The regulatory history makes clear that the CCC is fully aware and approves of the practice of shuffling-at-will when there is a player-favorable count as a countermeasure against card-counters. When the CCC published the proposal to allow the casinos to shuffle-at-will, it noted that the casinos might shuffle when the count is favorable and that this practice might affect the odds of the game:

> The economic impact of this proposed amendment would vary depending on when in fact the cards were shuffled. For example, if the cards were always shuffled after *533 the first round of play regardless of the point count, then the casino advantage against the basic strategy player and average player would probably remain the same with the advantage enjoyed by the card-counter being decreased. If the cards, however, were only shuffled in positive point count situations and not in negative point count situations, the casino advantage against all types of players would increase.

14 N.J.R. 470 (May 17, 1982).

Furthermore, the regulatory history which plaintiffs painstakingly cite as support for their position that the CCC did not authorize the shuffle-at-will as a countermeasure does not prove what they would like it to prove. Plaintiffs rely on comments made during hearings on the proposed shuffle-at- will which explore possible disadvantages of the shuffle-at-will without acknowledging that, these disadvantages notwithstanding, the CCC decided that the shuffle-at-will was the best alternative to neutralize the threat posed by card-counters. The recent brief filed as the official CCC position before the New Jersey Supreme Court in the Campione case further demonstrates the CCC's unequivocal acceptance of the shuffle-at-will, as well as the

other countermeasures plaintiffs allege constitute predicate acts. In their brief, the CCC specifically states "the practice of 'shuffling-at-will' is authorized by Commission regulations at N.J.A.C. 19:47-2.5 and affects all patrons at a blackjack table." CCC Brief at 5, Exh. H to Casino Def. Reply Br. The CCC brief continues:

> [T]he Commission accords to casino licensees the discretion to permit a player to wager on more than one "box" or place at a table. N.J.A.C. 19:47- 2.14. The Commission has also approved internal control submissions, filed by casino licensees pursuant to N.J.S.A. 5:12-99, which give casino licensees the discretion to permit a player to exceed the wager limit at a table. No Commission regulation requires that these measures be applied on a table-wide basis, nor has the Commission otherwise required such application of these rules. These rules balance the statutory goals of casino vitality and fair odds to all players, N.J.S.A. 5:12-100e, and must consider both the fairness and integrity of casino gaming and the "right of the casinos to have the rules drawn so as to allow some reasonable profit."

Id. at 5-6 (quoting Uston, 89 N.J. at 175, 445 A.2d 370). Plaintiffs simply cannot claim as predicate acts those practices clearly authorized by the CCC.

[6][7] Plaintiffs' other alleged predicate acts are similarly insufficient to support a RICO claim. The alleged violations of criminal statutes regarding unlawful debt collection, 18 U.S.C. § 1962, transmission of gambling information, 18 U.S.C. § 1084, interference with commerce by threats or violence, 18 U.S.C. § 1951, interstate commerce for unlawful activity, 18 U.S.C. § 1952, and operating an illegal gambling business, 18 U.S.C. § 1955, all derive from the allegations regarding the use of authorized countermeasures and other alleged violations of the CCC regulations. Any debts allegedly "unlawfully collected" are those lost by plaintiffs

during blackjack games played in accordance with the CCC regulations. Any "illegal gambling business" or "unlawful activity in interstate commerce" is simply the play of blackjack as authorized by the CCC. Similarly, the casinos do not engage "in unlawful activity" or "operating an illegal gambling business" by not offering plaintiffs "comps," which are free gifts casinos have absolutely no obligation to offer. These activities do not constitute crimes and therefore are not predicate acts. Furthermore, plaintiffs, although mentioning the use of "shills" in their complaint, [FN15] have not made any allegations that the casinos violate the statutory prohibition of the use of "shills," persons who induce potential patrons to enter a casino or induce them to play any game. N.J.S.A. 5:12-100(l). Thus, plaintiffs' "shills" allegation likewise fails to state a predicate act.

> FN15. As noted earlier, see supra note 4, plaintiffs' complaints about "shills" are really complaints about the alleged use of "anti-shills."

*534 The only alleged predicate acts that are not based on CCC regulations are the allegations of assaults, threats, and stalking in person and via the Internet. Plaintiffs allege that one plaintiff was knocked off his seat on one occasion, that some plaintiffs were followed around casinos, and that one plaintiff was grabbed by the arm while being escorted out of a casino. However, these minor altercations do not constitute crimes and therefore are not predicate acts. Nor do the plaintiffs' claims of receiving anonymous pornographic, offensive and threatening messages over the Internet from John Doe defendants constitute predicate acts as plaintiffs put forth no basis for alleging that the messages were sent by anyone associated with the Casino Defendants.

[8][9][10][11][12] Plaintiffs have also not alleged a compensable injury to "business or property" within the meaning of the RICO statutes. In order to state a claim under RICO, a plaintiff must allege an injury to "business or

property" that is proximately caused by the RICO violation. 18 U.S.C. § 1964(c). Injury to "business or property" requires a "concrete financial loss, and not mere 'injury to a valuable intangible property interest.' " Steele v. Hosp. Corp. of America, 36 F.3d 69, 70 (9th Cir.1994). A lost opportunity to obtain a financial benefit is too speculative to constitute an injury to business or property under RICO. Anderson v. Kutak, Rock and Campbell, 51 F.3d 518, 522 (5th Cir.1995). A plaintiff must allege present, actual damages, not speculative claims of lost future opportunities. Id. at 522-23; Steele, 36 F.3d at 70-71. In addition, personal injuries are not compensable under RICO. Genty v. Resolution Trust Corp., 937 F.2d 899, 918- 19 (3d Cir.1991).

[13] The only injuries plaintiffs have identified in connection with their RICO claims are (1) the closing of card-counting schools and mock casinos, and (2) the loss of gambling income. The alleged closure of the card- counting schools and mock casinos might have constituted compensable injury for those plaintiffs involved in them if these alleged injuries had occurred within the four-year statute of limitations applicable to civil RICO claims. Klehr v. A.O. Smith Corp., 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997). However, as the schools were closed in 1992, the plaintiffs' RICO claim based on this predicate act is time-barred. Plaintiffs' alleged loss of tens of millions of dollars [FN16] in gambling income is far too speculative to constitute compensable injury to business or property. The loss of an opportunity to gamble under favorable conditions does not constitute injury to business since plaintiffs are not, and do not so allege in their complaint, in the "business" of gambling. It also does not constitute injury to "property" since there is no property right in the opportunity to gamble under any circumstances, let alone under favorable conditions. In addition, any such loss is far too speculative to be compensable, see Anderson, 51 F.3d at 522- 23; Steele, 36 F.3d at 70-71, especially since the complaint itself acknowledges that there are numerous authorized

countermeasures that the casinos can properly use to completely eliminate any possible advantage a card- counter might be able to obtain. Finally, *535 most of the plaintiffs allegedly ceased card-counting prior to the four-year statute of limitations. Thus, plaintiffs RICO claims fail because they have not shown any predicate acts or any injury to "business" or "property." Accordingly, we will dismiss them under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

> FN16. In their RICO count, plaintiffs allege an injury to business or property in their loss of tens of millions of dollars in lost gambling income. Compl. at ¶ 276. Later, plaintiffs make a claim for nearly two hundred and fifty million dollars, claiming "an extremely conservative and mathematically provable estimate of minimum losses ... over the last six years amount[ing] to $248,000,000." Id. at ¶ 283. Factoring in the alleged value of lost comps, they claim the loss rises to $ 347,532,800. One paragraph of plaintiffs' complaint alleges that during a cooperative effort from June 1989 to May 1990, participating plaintiffs, betting an average of $400 per hand, made average daily wagers of approximately $5,760,000 per day. It then alleges that use of shuffling-at will by the casinos resulted in lost income of $115,000 per day (based on two shifts of 30 players playing four hours per shift, making an average of 60 wagers per hour at $4000 per wager and 2% additional casino advantage over the normal chance of the game as a result of the shuffle-at-will). If the casinos were not entitled to use the shuffle-at-will, plaintiffs claim they would have won, during this 11-month period of alleged daily playing by 30 players, approximately $37,950,000. If only 30 card-counters could cause this much loss, casinos would no longer be financially viable unless they ceased to offer the game of blackjack, one of the most popular casino games, or

devised new countermeasures which would leave plaintiffs no better off than they are now.

D. Common Law Claims

Similarly, plaintiffs' claims in their Second Count (contractual claims), Third Count (fraud and misrepresentation claims), Fifth Count (tortious interference claims) and Seventh Count (negligence claims) fail to state claims upon which relief may be granted because the casinos are legally entitled to subject card-counters to countermeasures such as shuffling-at-will, keeping track of known card-counters, and advertising the game of blackjack as a fair game of chance. Although plaintiffs attempt to bolster their essential charge that the casinos cannot take countermeasures to neutralize card-counters by expanding it into these specious claims under the common law, the simple fact remains that the casinos are explicitly authorized to undertake the practices plaintiffs claim are illegal.

[14][15][16] It is well-established that casino patrons cannot assert private causes of action based on alleged violations of CCC regulations regarding the rules of casino games. See Campione, 302 N.J.Super. at 110, 118, 694 A.2d 1045; Decker v. Bally's Grand Hotel Casino, 280 N.J.Super. 217, 222, 655 A.2d 73 (App.Div.1994). Even where, unlike here, a violation of the CCC regulations takes place, courts refuse to find a private cause of action. Miller v. Zoby, 250 N.J.Super. 568, 571-73, 595 A.2d 1104 (App.Div.), cert. denied, 127 N.J. 553, 606 A.2d 366 (1991); cf. Hakimoglu, 70 F.3d at 293-94 (holding that casino is not liable under common law tort for serving patron free drinks and allowing him to continue gambling while intoxicated); Marcangelo v. Boardwalk Regency Corp., 847 F.Supp. 1222, 1229 (D.N.J.1994) (holding that common law claims for breach of contract and fraud based on conduct governed by CCC regulations are not viable, as the "respective rights and obligations of the parties have been articulated and developed by statutes and

regulations, not by the common law," and thus such claims would be preempted by the Act), aff'd, 47 F.3d 88 (3d Cir.1995); Tose, 819 F.Supp. at 1316 n. 8 (suggesting no common law tort liability against casinos for serving patron alcoholic drinks and allowing her to continue gambling while intoxicated). Thus, we will dismiss these claims, like the RICO claims, pursuant to Rule 12(b)(6). [FN17]

> FN17. We note that, even if plaintiffs did have a private cause of action against the casinos for alleged regulatory violations, their claim for tortious interference with prospective economic advantage would fail because it does not allege a reasonable expectation of economic advantage. See Woods Corporate Assoc. v. Signet Star Holdings, 910 F.Supp. 1019, 1031 (D.N.J.1995). The CCC regulations governing blackjack are designed to ensure a statistical advantage to the casinos, even against card-counters. See Campione, 302 N.J.Super. at 110, 694 A.2d 1045; Hyland, at 20, Exh. A to Casino Def. Br., Plaintiffs' claim that, nonetheless, they have a reasonable expectation of consistently winning great sums of money at blackjack ignores the economic reality of the New Jersey casino system.

E. Constitutional and Civil Rights Claims

[17][18][19][20] Plaintiffs' Sixth Count alleges violations of the Equal Protection Clause, the Due Process Clause, Article 1, paragraph 1 of the New Jersey Constitution, and 42 U.S.C. § 1983. [FN18] As defendants correctly point out, this count fails to state a claim upon which relief can be granted for several reasons. First, plaintiffs' allegations of state action are insufficient. State regulation and the CCC's authorization of casino activities does not transform the casinos into state actors. See Uston v. Hilton Hotels Corp., 448 F.Supp. 116, 118 (D.Nev.1978); State v. Sanders, 185 N.J.Super. 258, 267, 448 A.2d 481 (App.Div.1982). It is well-established that "[m]ere

approval of or acquiescence in *536 the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." Blum v. Yaretsky, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); see Jackson v. Metropolitan Edison Comp., 419 U.S. 345, 350-51, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Second, plaintiffs have not suffered any equal protection clause violation since, under the rational basis test applicable for a non- protected class such as card-counters subject to CCC regulations, see Bally Mfg. Corp. v. New Jersey Casino Control Comm'n, 85 N.J. 325, 335, 426 A.2d 1000 (casino regulations examined under rational basis test), appeal dismissed, 454 U.S. 804, 102 S.Ct. 77, 70 L.Ed.2d 74 (1981), the countermeasures used by the casinos and authorized by the CCC are rationally related to the legitimate state interest in protecting the financial viability of the casino industry. See N.J.S.A. 5:12-1(b)(12). Third, plaintiffs have no property interest in the opportunity to gamble and thus have not had their substantive due process rights violated. Therefore, we will dismiss plaintiffs' Sixth Count for failure to state a claim upon which relief can be granted.

> FN18. The Sixth Count also alleges various state and federal statutory claims against the John Does for sending offensive messages and alleged threats over the Internet. These statutory claims are specious at best and need not be addressed further.

F. Civil Conspiracy

[21] Plaintiffs' Thirteenth Count [FN19] against the Casino Defendants claims that all of the acts described in the complaint have been part of one overarching conspiracy among the Casino Defendants. This overly broad claim for civil conspiracy must fail. "The gravamen of an action in civil conspiracy is not the conspiracy itself but the underlying wrong which, absent the conspiracy, would give a right of

action." Bd. of Educ., of Asbury Park v. Hoek, 38 N.J. 213, 218, 183 A.2d 633 (1962); see Resolution Trust Corp. v. Wilson, 851 F.Supp. 141, 147 (D.N.J.1994). Because we have dismissed all of the other claims of alleged wrongdoing and because the only possible cooperation among the defendants took place through "sharing of information as to who card-counters are [which] is not itself an illegal conspiracy," Hyland, at 29, we will similarly dismiss their claim for civil conspiracy.

> FN19. This Count is not numbered, but appears after the Twelfth Count against the Casino Defendants.

G. Consumer Fraud Act Claim

Plaintiffs omitted in their amended complaint, a claim contained in their original complaint, for violation of the New Jersey Consumer Fraud Act. In their brief and in a letter to defendants, plaintiffs have asked that they now be permitted leave to amend the complaint to reinclude the Consumer Fraud Act claim. Defendants have addressed the merits of any Consumer Fraud Act claim in their motion to dismiss papers. We will treat plaintiffs' request in their brief and defendants' apparent non-objection as a stipulation for leave to amend the complaint. However, we must deny leave for an amendment to re- include this claim because it is completely without merit and it would be futile to amend the complaint to include a meritless claim. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir.1997) ("Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility ") (emphasis added).

[22][23][24] The New Jersey Supreme Court has recently held that the Consumer Fraud Act will not apply to a heavily regulated industry when application of that statute would create a "real possibility" of conflict between the directives of the Consumer Fraud Act, as administered by

the Division of Consumer Affairs, and the directives of the regulatory schemes of other administrative bodies. Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255, 268, 696 A.2d 546 (1997). The Act will not apply where "the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying legislative intent not to subject parities to multiple regulations that, as applied, will work at cross-purposes." Id. at 270, 696 A.2d 546. Here, the Act evidences a clear legislative intent to have the rules of casino gaming, and the advertising related thereto, governed exclusively by the CCC. See N.J.S.A. 5:12- 133(b); id. 5:12-70(o). To allow claims such as the plaintiffs' to proceed in federal court under the Consumer Fraud Act would create conflicts with the CCC's *537 regulatory scheme. The regulation of the game of blackjack, including shuffling-at-will and the advertisement of blackjack and its rules, is an issue that is within the exclusive jurisdiction of the CCC and about which the CCC has particularized expertise not possessed by courts and juries. Furthermore, the goals of the Consumer Fraud Act and the Act are not entirely consistent. The Consumer Fraud Act is concerned solely with the protection of consumers. The Act, however, has dual purposes that must be balanced--the protection of gambling patrons and the protection of the financial viability of the casino industry. Id. 5:12-1(b)(12). Finally, even prior to Lemelledo, this Court suggested that the extensive CCC regulation of the casinos precludes an action under the Consumer Fraud Act. See Marcangelo, 847 F.Supp. at 1228. Thus, we find plaintiffs' claim under the Consumer Fraud Act to be wholly without merit and we will not permit leave to amend the complaint to re-include it.

The remainder of plaintiffs' claims are not based on alleged violations of the CCC regulations and do not involve any federal claims. Because we have dismissed all the claims over which we had original jurisdiction and those state law claims implicating the same CCC regulations, we decline to

retain jurisdiction over the remaining claims. We briefly address each of those claims below.

H. Public Accommodations Act

Plaintiffs have withdrawn their Fourth Count alleging a violation of the New Jersey Public Accommodations Act, N.J.S.A. 10:1-2 et seq., and therefore this claim will be dismissed.

I. Personal Injury Claims

[25] Plaintiffs' Eighth and Ninth Counts assert personal injury claims on behalf of one plaintiff, Bolick, against the Sands casino for an alleged incident whereby Bolick was knocked out of his chair and then surrounded by casino personnel. These claims, asserting specific incidents of alleged mistreatment of one specific plaintiff by one specific casino, are clearly separable from the essential card-counting countermeasure claims at the heart of the rest of the complaint. We do not believe they form part of the same "case or controversy" under Article III. See 28 U.S.C. § 1367(a); Gibbs, 383 U.S. at 725-26, 86 S.Ct. 1130. Even if they did, we would decline to exercise supplemental jurisdiction because we have denied all claims over which the Court has original jurisdiction. 28 U.S.C. § 1367(c)(3). Plaintiff Bolick's Eighth and Ninth Counts will therefore be remanded to state court.

J. Privacy Claims

[26] Plaintiffs' Tenth Count, brought on behalf of six non-card- counting plaintiffs, asserts two privacy claims: [FN20] misappropriation of name or likeness for purposes of commercial publicity, and publicity that places plaintiffs in a false light before the public. In order to state a claim for misappropriation of name and likeness, plaintiffs must allege that a defendant has used his name or likeness "for the

purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness ...." Bisbee v. John C. Conover Agency, Inc., 186 N.J.Super. 335, 342, 452 A.2d 689 (App.Div.1982); see Tellado v. Time-Life Books, Inc., 643 F.Supp. 904, 909 (D.N.J.1986). Here, defendants have not used plaintiffs' pictures for purposes of "taking advantage of [their] reputation, prestige, or other value associated with it," Bisbee, 186 N.J.Super. at 342, 452 A.2d 689, and therefore do not appear to make out a misappropriation claim.

> FN20. Plaintiffs have withdrawn their claims for unreasonable intrusion into private affairs and unreasonable publicity regarding private facts, so we will dismiss these claims on that ground.

Plaintiffs' false light claim likewise does not appear to state a claim upon which relief can be granted. Plaintiffs fail to establish that the alleged use of their names and likenesses would be "highly offensive to a reasonable person" and thereby have not stated a claim for false light. Bisbee, 186 N.J.Super. at 342, 452 A.2d 689; Romaine v. Kallinger, 109 N.J. 282, 293, 537 A.2d 284 (1988); Tellado v. Time-Life Books, Inc., 643 F.Supp. 904, 907 (1986). Being labeled a card-counter does not rise to the level of *538 being "highly offensive to a reasonable person."

[27] However, because these privacy claims do not arise from a "common nucleus of operative fact" with the CCC regulation claims upon which our federal jurisdiction is based, Gibbs, 383 U.S. at 725, 86 S.Ct. 1130, see 28 U.S.C. 1367(a), and because we decline supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(c)(3), we will remand these claims to state court.

K. Slander and Libel Claims

[28][29] Plaintiffs Eleventh Count alleges claims for libel,

libel per se, slander, slander per se and injurious falsehoods on behalf of six specific non- card-counting plaintiffs and generally on behalf of all plaintiffs. Defendant Griffin and John Doe casino employees are named as defendants. In order to state a claim for libel or slander, a complaint must allege the defamatory words, the person who uttered them, and when, where, and to whom they were published. See Zoneraich v. Overlook Hospital, 212 N.J.Super. 83, 101, 514 A.2d 53 (App.Div.), cert. denied, 107 N.J. 32, 526 A.2d 126 (1986); Kotok Building v. Charvine Co., 183 N.J.Super. 101, 103, 443 A.2d 260 (Law Div.1981). The statute of limitations for libel and slander is one year. N.J.S.A. 2A:14-3. Thus, a complaint must allege the publication of each defamatory statement within one year of the filing of the complaint. The statute of limitations in defamation actions is to be strictly construed. Miele v. Rosenblum, 254 N.J.Super. 8, 12, 603 A.2d 43 (App.Div.1991). In Miele, the defendant was charged with publishing two articles on specified dates and thereafter "continued to publish facts about plaintiff which placed plaintiff in a false light." Id. at 10, 603 A.2d 43. In granting the defendant's motion for summary judgment, the Miele court held that "[i]n the case of a complaint charging defamation, the plaintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication. A vague conclusory allegation is not enough." Id. Because the plaintiff in Miele failed to specify any facts with regard to the alleged subsequent defamatory publications, the Appellate Division held that the statute of limitations period relevant to the two specifically pled instances of defamation was applicable to the entire complaint.

[30] Here, plaintiffs' complaint alleges that unspecified statements implying plaintiffs were card-counters involved in cheating activity were made by Griffin and hundreds of unidentified John Does "from on or about 1989 up until the present." Compl. at ¶ 413-28. However, the complaint fails to identify any specific statement made by any specific

defendants about any specific plaintiff within the one year limitations period. We feel these allegations are simply too vague to demonstrate defamation within the statute of limitations. Furthermore, we find it likely that these allegations are too vague to set forth claims of defamation. Under New Jersey law, defamation is defined as: (1) a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; (4) which was communicated to a person or persons other than the plaintiff; (5) with actual knowledge that the statement was false or with reckless disregard of the statement's truth or falsity or with negligence in failing to ascertain the truth or falsity; and (6) which caused damage. Feggans v. Billington, 291 N.J.Super. 382, 391, 677 A.2d 771 (App.Div.1996); see Petrocco v. Dover General Hosp., 273 N.J.Super. 501, 521, 642 A.2d 1016 (App.Div.), cert. denied, 138 N.J. 264, 649 A.2d 1284 (1994); Kotlikoff v. Community News, 89 N.J. 62, 67, 444 A.2d 1086 (1982). Without any specific allegations as to what was allegedly said about any specific plaintiff and by whom at what time, plaintiffs have failed to meet the requirements for setting forth a cause of action of defamation. [FN21] However, theoretically, there may exist a plaintiff who would be able to set forth more specifically the details necessary to demonstrate that he or she has been defamed within the one-year statute of limitations. Therefore, although there is no basis for us to retain *539 supplemental jurisdiction over this unrelated state claim, 28 U.S.C. § 1367(a) or for us to not to decline supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3), we will remand this claim to state court under the belief that there might exist a plaintiff who deserves an opportunity to amend the claim to properly allege cognizable defamation.

> FN21. Plaintiffs' failure to meet the statute of limitations and pleading requirements for their defamation claim demonstrates precisely the problem with a complaint that lumps sixty plaintiffs, over forty-one named defendants, hundreds of John Doe defendants and incredibly diverse causes of

action together in one long and confusing document.

L. Intentional Infliction of Emotional Distress

Plaintiffs have withdrawn their Twelfth Count alleging intentional infliction of emotional distress and therefore this claim will be dismissed.

M. Claims Against Lawyer Defendants

Plaintiffs have alleged various claims against nine lawyer and law firm defendants arising out of alleged malpractice and negligence associated with advice and/or representation offered at different points in time by the different law firms with respect to the claims alleged in the current complaint. The Counts against these Lawyer Defendants include various state law claims of legal malpractice, including breach of fiduciary duty, negligence, breach of express, implied or oral contract, breach of the covenant of good faith and fair dealing, misrepresentation and negligent supervision. We find these claims, as stated, to be vague and confusing. For example, it is difficult to determine which firms represented which plaintiffs during which time period. It is also impossible to discern whether any of the firms failed to advise plaintiffs as to the proper statute of limitations as most of plaintiffs' underlying claims are murky conglomerations of various statutory, tort and contract actions. Furthermore, the viability of claims alleging incorrect legal advice with respect to the plaintiffs' essential CCC regulation claims may ultimately depend on the New Jersey Supreme Court's decision in Campione. Although we could properly dismiss these claims on these grounds alone, we feel the better course is to remand them to state court for further elucidation as to the alleged malpractice, particularly in light of the soon expected Campione decision. Because they arise from a completely different, though perhaps tangentially-related, set of facts from the underlying CCC regulation claims, see Gibbs, 383 U.S. at 725-26, 86 S.Ct. 1130;

28 U.S.C. § 1367(a), and because we have dismissed all federal claims, we will decline supplemental jurisdiction over any of the state law claims against the Lawyer Defendants, 28 U.S.C. § 1367(c)(3), and remand these claims to state court.

III. CONCLUSION

Plaintiffs' beef is with the countermeasures taken by casinos to frustrate card-counting blackjack players. The only real issue in this case is whether the Act authorizes the CCC to permit casinos to engage in this type of activity or to treat card-counters differently from other blackjack players. Plaintiffs' complaint is a verbose, confused, overreaching and immature work product, and its allegations of cheating, RICO, consumer fraud, constitutional violations, defamation and civil conspiracy confuse rather than elucidate the essential nature of the dispute.

We hold that the clearly expressed intention of the New Jersey Legislature to ensure the financial viability of the casino industry provides ample justification for the CCC regulations and practices permitting casinos, for example, to (1) "shuffle-at-will," (2) limit a player to playing and wagering on one hand at a table, (3) selectively limit the betting limit for a given player at a table, (4) count cards themselves to determine when the cards in the shoe should be reshuffled and (5) identify card counters and share this information with other casinos.

Even were we to conclude that the CCC has acted improperly or illegally in adopting these regulations or permitting these practices, this court would not be a proper forum in which to recover damages or seek equitable relief. The Appellate Division of the New Jersey Superior Court has recently held that the CCC has exclusive jurisdiction over claims that a casino has violated the rules of play and has clearly stated that "there is no private cause of action

against a casino for its alleged violation of [CCC] regulations governing the manner in which games are played." Campione, 302 N.J.Super. at 118, 694 A.2d 1045. We had earlier agreed with *540 this position in a footnote appearing in Tose v. Greate Bay Hotel Casino, 819 F.Supp. 1312, 1316 n. 8 (D.N.J.1993), aff'd, 34 F.3d 1227 (3d Cir.1994). Our analysis was subsequently approved by the Third Circuit in Hakimoglu v. Trump Taj Mahal Associates, 70 F.3d 291, 293-94 (3d Cir.1995).

[31] We further hold that when a casino conducts gaming activity either (1) in accordance with regulations adopted by the CCC or (2) openly in a manner not inconsistent with those regulations there can be no liability at common law or under the Act to a patron for gambling losses or lost winning opportunities, even if the New Jersey Supreme Court should ultimately determine that the CCC acted improperly in adopting the regulations at issue or in not stopping the casino from operating the game in the manner challenged. The legislative judgment giving the CCC the right to regulate the minutiae of gambling carries with it the right of the casinos to rely on the CCC when it exercises that judgment. [FN22]

> FN22. We express no opinion as to whether (i) the CCC can grant monetary damages or awards to individual casino patrons or (ii) the Act or the common law provides or implies a private right of action in the courts in favor of a patron who suffers losses because a casino clandestinely conducts gaming activity contrary to or inconsistent with the CCC regulations, e.g., using "loaded" dice or fixing a roulette wheel.

For the foregoing reasons, we will dismiss with prejudice pursuant to Fed.R.Civ.P. 12(b)(6) all of the claims relating to the alleged violations of the CCC regulations. (First, Second, Third, Fifth, Sixth, Seventh, and Thirteenth Counts). Because

the Court declines to exercise supplemental jurisdiction, the remainder of the claims shall be remanded to state court. 28 U.S.C. § 1367(a); 28 U.S.C. § 1367(c)(3). (Eighth, Ninth, Tenth, Eleventh, and Lawyer Defendant claims). Plaintiffs have agreed to the dismissal of the Fourth and Twelfth Counts, and we are denying permission to reinstate the Consumer Fraud Act count. An appropriate order will be issued accordingly.

APPENDIX E: EXPERTS FROM TRANSCRIPT OF ORAL ARGUMENTS BEFORE HON. JOSEPH E. IRENAS, APRIL 28, 1998.

1 THE COURT: following relieve, you wanted all their permits revoked. Their
2 certificate. I'm not saying the law doesn't say that, but what
3 you asked is -- you asked is that -- do you really want
4 them -- you want the state to revoke all the casinos licenses
5 to practice, to gamble, all their certificates of
6 incorporation, just basically close them all up, is that what
7 you want? Isn't that what you asked for? Let me start there.
8 Did your complaint --
9 MR. ALTSCHULER: It did ask for that, your Honor.
10 THE COURT In effect the closing down of all the
11 casinos.
12 MR. ALTSCHULER: Yes, your Honor.
13 THE COURT: Do you want that?
14 MR. ALTSCHULER: If the casinos don't want to offer an
15 honest game of blackjack, that's exactly what we want.
16 THE COURT: You've asked —- that's the relief you've
17 asked for.
18 MR. ALTSCHULER That's one of the items of relief,
19 your Honor.
20 THE COURT: I know. Do you want that relief?
21 MR. ALTSCHULER: We don't want to close down the
22 casinos, we want -
23 THE COURT: Why did you ask me to do it?
24 MR. ALTSCHULER: Because the casinos haven't changed
25 their

***

3 THE COURT: Oh, come, come. Nobody is playing
4 against the dealer. The dealer has no choice. Everything the
5 dealer does is mandated.
6 The dealer - please. When you do things like that,
7 Mr. Altschuler, you hurt your effectiveness as an advocate.
8 Everybody knows, unless they've changed the rules of
9 the game since - I haven't -- since I became a judge, I don't
10 go to the casinos because we have too many cases involving
11 them, but I have to confess, I was more than a one or two time
12 attender at the Blackjack tables before I became a judge. And
13 as I recall the rules, the dealer has no choice. Everything the
14 dealer does, from the time he fans the cards out on a new
15 table, to the time he closes up shop at the end of that table's
16 day of play, he does mandated by the rules. And I think he's
17 got to hit at 16 or less, he's got to stay at 17 or more. He's
18 not making a bet, so he has no betting strategy. It's not as
19 if he says "well, I'll bet $20 on this one, I'll wager $1,000
20 on this one". There is no discretion.
21 So your argument that somehow or other that people
22 are playing against the dealer, they're not playing against the
23 dealer. They're playing -- the dealer has no discretion at all.

***

Appendix F: 28 U.S.C. § 455

28 U.S.C. § 455 provides:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Supreme Court, U.S.
FILED
APR 19 2001
OFFICE OF THE CLERK

(2)

No. 00-1502

IN THE

Supreme Court of the United States

DOUG GRANT, INC., *et al.*,

Petitioners,

v.

GREATE BAY CASINO CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GREATE BAY HOTEL AND CASINO, INC. T/A "SANDS HOTEL & CASINO"

FREDERICK H. KRAUS
Attorney for Respondent
Greate Bay Hotel and Casino, Inc.
t/a "Sands Hotel & Casino"
Sands Hotel & Casino
Indiana Ave. & Brighton Park
Atlantic City, NJ 08401
(609) 441-4517

166454

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Greate Bay Hotel and Casino, Inc. t/a "Sands Hotel & Casino" ("Sands"), is owned by GB Holdings, Inc., a Delaware Corporation, which is traded on the American Stock Exchange ("GBH"). By virtue of a certain repurchase agreement, American Real Estate Partners, L.P., a Delaware Limited Partnership, which is publicly traded on the New York Stock Exchange, might be considered to have more than a 10% beneficial interest in the stock of GBH. In addition, certain high yield investment funds managed by affiliates of Merrill Lynch may own collectively more than 10% of the stock of GBH.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Reasons for Denying the Writ	1
I. The Court Should Decline The Invitation To Render An Advisory Opinion On The Section 455 Question.	2
II. The Motion Was Meritless.	3
III. There Is No Conflict With This Court's Precedents.	8
IV. The Misrepresentations Continue Unabated Here.	9
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Campione v. Adamar, 274 N.J. Super. 63 (Law. Div. 1993) 3

Campione v. Adamar, 302 N.J. Super. 99 (App. Div. 1997) 3

Campione v. Adamar, 155 N.J. 245 (1998) 3

Doug Grant Inc. v. New Jersey Casino Control Commission, Nos. A-3605-98T3, A-999-99T3 (N.J. Super. App. Div., April 16, 2001) 7

Easley v. University of Michigan, 853 F.2d 1351 (6th Cir. 1988) 6, 8, 9

Health Serv. Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988) ... 9

In re Elsinore License Renewal, 11 N.J.A.R. 382 (CCC, April 14, 1986) 5

In re: Elsinore Shore Associates, 102 B.R. 958 (D.N.J. 1989) 5

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 1, 2, 8

Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163 (1982) 7

Cited Authorities

Page

Statutes:

28 U.S.C. § 455 ..... 1, 2, 3, 8

28 U.S.C. § 455(b)(5) 6, 8

N.J.S.A. 5:12-1 *et seq.* 3

N.J.S.A. 5:12-12 5

N.J.S.A. 5:12-14a 7

N.J.S.A. 5:12-55 4

N.J.S.A. 5:12-63 4

N.J.S.A. 5:12-70(f) 3

N.J.S.A. 5:12-74(d-e) 4

N.J.S.A. 5:12-76 4

N.J.S.A. 5:12-82-88 ..... 5, 10

N.J.S.A. 5:12-92 5

N.J.S.A. 5:12-99 10

N.J.S.A. 5:12-102(m) 7

N.J.S.A. 5:12-115 3

Cited Authorities

	Page
N.J.S.A. 5:12-144(a)	6
N.J.S.A. 5:12-144.1(a)(2)	6
N.J.S.A. 5:12-145	6
N.J.S.A. 5:12-153	6
N.J.S.A. 5:12-160	6
N.J.S.A. 5:12-162	6
Rules:	
F.R. Civ. P. 12(b)(6)	2, 8
F.R. Civ. P. 60(b)	2
F.R. Civ. P. 60(b)(6)	2
Other Authorities:	
N.J.A.C. 19:40-2.1(c)(5)(ii)	4
N.J.A.C. 19:40-4.1 *et seq.*	4
N.J.A.C. 19:47-2.1-2.22	7
N.J.A.C. 19:47-2.5(a)	3, 7

Cited Authorities

	Page
N.J.A.C. 19:47-2.12(b)	7
N.J.A.C. 19:47-2.14	7
N.J.A.C. 19:47-8.2(b)	7
31 N.J. Reg. 556 (Feb. 16, 1999)	3

REASONS FOR DENYING THE WRIT

1. Petitioners seek an advisory opinion regarding the disqualification issue under 28 U.S.C. § 455 ("Section 455") because the Third Circuit affirmed the granting of the motion to dismiss, exercising plenary review. Review of the Section 455 question would not disturb the legal basis for the judgment of the courts below unless review was expanded to cover the underlying legal issues of the validity of countermeasures utilized against blackjack card counters despite New Jersey Supreme Court and Casino Control Commission ("CCC") rulings against the interests of Petitioners. Note 1, *infra*.

2. The "emergency" motion for a remand for an evidentiary hearing on the Section 455 question lacked merit.

3. Neither novel legal issues nor conflicting decisions are presented because the Third Circuit also concluded that the "emergency" motion was "without merit." Pet. App. at 34. Thus, Petitioners are not asking this Court to review a conflict with *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) or its progeny, but a decision that the allegations of the "emergency" motion raised no concerns under *Liljeberg*.

4. The disposition of the Petitioners to couch "their arguments in dramatic hyperbole obfuscating the real issues" and "mischaracteriz[ing] the facts", which disturbed the Third Circuit, continues here unabated. Pet. App. at 24.

I.

THE COURT SHOULD DECLINE THE INVITATION TO RENDER AN ADVISORY OPINION ON THE SECTION 455 QUESTION.

Just before argument in the Third Circuit, Petitioners filed an "Emergency Motion for Evidentiary Hearing to Determine Whether the Hon. Joseph E. Irenas Had or Has an Undisclosed Conflict of Interest or Financial Interest in the Outcome of the Case" (the "Motion"). The Third Circuit "considered [the Motion] carefully and [denied it] as . . . without merit" (Pet. App. at 34) and, in exercising plenary review where no factual issues were decided by the District Court, agreed with the legal basis for the F.R. Civ. P. 12(b)(6) dismissal.

Suppose instead that the Third Circuit had remanded for an evidentiary hearing and that another District Judge had concluded that Judge Irenas should have recused himself pursuant to Section 455. Under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the next question for the District Court would have been whether to vacate the judgment pursuant to F.R. Civ. P. 60(b)(6). 486 U.S. at 863. In addressing this issue, this Court noted, "there is surely room for harmless error" (486 U.S. at 862) and that "Rule 60(b) relief is . . . neither categorically available nor categorically unavailable for all Section 455 violations." 486 U.S. at 864. Rule 60(b) relief would be categorically unavailable here because the Third Circuit determined that the judgment was correct as a matter of law. Accordingly, given the legal determination by the Third Circuit, and the limitation of the Petition to the Section 455 question, the decision on the merits by the Third Circuit would be

unaffected by any purely advisory opinion this Court might render limited to the Section 455 question.[1]

II.

THE MOTION WAS MERITLESS.

Turning to the Motion, nearly two years after the decision by Judge Irenas, Petitioners wrote to Judge Irenas on March 14, 2000, asked if he had performed consulting work for the CCC or the Division of Gaming Enforcement ("DGE"), basing the inquiry on an "unconfirmed report" by an undisclosed individual, and if he or his former firm

---

1. No reason exists to expand review to include the blackjack questions. An array of authority has rejected Petitioners' central claim (Pet. App. 53) that the use of the shuffle at-will after any round of play card counter countermeasure authorized by N.J.A.C. 19:47-2.5(a) violates N.J.S.A. 5:12-115, which prohibits use of cards that have "been marked . . . or placed in a condition . . . which tends to . . . alter the normal random selection . . ." The contention is that shuffling after a round of play when the remaining cards in the deck are favorable to card counters alters the odds of the game. Pet. App. at 42-43. Petitioners overlook that the game is how the CCC defines it under the Casino Control Act, N.J.S.A. 5:12-1 *et seq.* (the "Act"), which gives the CCC plenary authority to define and limit the rules of games. N.J.S.A. 5:12-70(f). The authorities rejecting that claim originating in Petitioners "test case" brought by Anthony Campione (Amended Complaint, Paragraph 447) include the Superior Court, Law Division, *Campione v. Adamar*, 274 N.J. Super. 63, 80 (Law. Div. 1993) (branding the argument "specious"), the Appellate Division, *See Campione v. Adamar*, 302 N.J. Super. 99, 113-114 (App. Div. 1997), the Supreme Court, *See Campione v. Adamar*, 155 N.J. 245, 250, 256, 259 (1998), the District Court (Pet. App. 53-54), the Third Circuit (Pet. App. at 11-25), and the CCC, branding it "absurd". 31 N.J. Reg. 556 (Feb. 16, 1999); n.4 *infra*.

(the "Firm") had represented any of the defendants, mentioning that Petitioners had seen no such information in his biography in Martindale-Hubble. Motion, Exhibit A.

The question concerning consulting work for the CCC or DGE was essentially frivolous given the nature of those agencies. The CCC has quasi-legislative and quasi-judicial jurisdiction under the Act to promulgate regulations and to decide all contested matters. N.J.S.A. 5:12-63. Other than the release of certain financial information, virtually all other information in the possession of the CCC is confidential. N.J.S.A. 5:12-74(d-e); N.J.A.C. 19:40-4.1 *et seq*. The CCC also has its own "Office of General Counsel, which shall render legal advice to the Chairman and the [CCC and] represent the Commission in litigation . . ." N.J.A.C. 19:40-2.1(c)(5)(ii). Similarly, the DGE is vested with the quasi-executive power to prosecute all violations of the Act before the CCC (N.J.S.A. 5:12-76), is supervised by a Director, reporting to the Attorney General (N.J.S.A. 5:12-55), and is staffed from the Department of Law and Public Safety and the State Police as determined by the Attorney General. Any reasonable person would have known it was extremely remote that the CCC or DGE with plenary legal staff and confidential documents would have retained Judge Irenas as a consultant when he was in private practice.

Judge Irenas responded promptly on March 16, 2000, advising that he had not performed consulting work for the CCC or DGE or represented either agency or their individual members. Motion, Exhibit B at 1. Although stating that he could not say for sure given the size of the Firm,[2] Judge

---

2. By this time, Judge Irenas had been on the bench for nearly eight years.

Irenas also stated that no member of the Firm represented either the CCC or DGE or their members other than one member of the CCC approximately 20 years earlier. *Id.* Finally, Judge Irenas stated that he was unaware of any conflict that had arisen due to his membership in the Firm, but mentioned that he had represented Playboy Enterprises, Inc. ("PEI") before the CCC in connection with the divestiture of its interest in a casino after PEI had become unlicensable. *Id.* at 1-2.[3]

The Motion also included letters dated May 5 and 10, 2000 between a Ken Wiseman and a partner at the Firm. Motion, Exhibits E-F. The subject matter was the possible representation by the Firm of Wiseman's business in obtaining a license to conduct business with casinos. An entity providing goods or services to a casino is a casino service industry (N.J.S.A. 5:12-12) ("CSI") subject to licensing pursuant to N.J.S.A. 5:12-92 in contrast to casinos, whose license requirements are set forth at N.J.S.A. 5:12-82-88. The partner at the Firm extolled the expertise of the Firm in an effort to get the work. In the first letter, the partner mentioned prior work for gaming companies to obtain casino licenses and for several CSI licensees. The second letter was written in response to a message from Wiseman to provide further information. The prior casino licensee work was described as the unsuccessful efforts to obtain licensure for PEI; the CSI licensing work was described as about one

3. In April 1982, the CCC ordered PEI to divest its interest in the Playboy Casino and approved the divestiture agreement in March 1984. *In re Elsinore License Renewal*, 11 N.J.A.R. 382, 396 (CCC, April 14, 1986). The casino, renamed the "Atlantis", was ordered closed by the CCC in May 1989 and shortly thereafter the principal assets of the bankruptcy estate were sold to a third party. *In re: Elsinore Shore Associates*, 102 B.R. 958, 960 n.3 (D.N.J. 1989).

a year; and work "on several occasions" for lenders to casino licensees was mentioned. Motion, Exhibit F at 1-2. This correspondence including the unsuccessful efforts for PEI was consistent with Judge Irenas' letter of March 16, 2000 and presented no basis for disqualification because no person with whom Judge Irenas previously practiced law "served during such association as a lawyer concerning the matter" in controversy. Section 455(b)(5); *Easley v. University of Michigan*, 853 F.2d 1351, 1358 n.5 (6th Cir. 1988) (in matter concerning law school, patently insufficient that judge's sons were member of judge's former firm whose clients included University of Michigan Hospital).

Bond work performed on behalf of the Casino Reinvestment Development Authority ("CRDA") was also identified in the Firm resume on Public Finance attached to the Motion as Exhibit G. Casinos pay an 8% gross revenue tax to the CCC (N.J.S.A. 5:12-144(a)), which is dedicated to certain programs for the benefit of senior citizens and the disabled. N.J.S.A. 5:12-145. Quarterly deposits of 1.5% of gross revenues are made to the State Treasurer for the benefit of the CRDA (N.J.S.A. 5:12-144.1(a)(2)), a separate administrative agency (N.J.S.A. 5:12-153), whose purpose is sponsoring redevelopment projects with that revenue stream (N.J.S.A. 5:12-160), and which takes the funds on deposit and issues its bonds to casino licensees in return. N.J.S.A. 5:12-162. Thus, the bond work for the CRDA put the Firm on the other side of the table from casinos.

The Motion also included the Financial Disclosure form for Judge Irenas for 1997 as Exhibit H. That disclosure was unremarkable, listed holdings of certain New Jersey State and Municipal Bonds at 2-4 and explained at 5-6 that a KEOGH Retirement Plan had been maintained on his behalf

by the Firm, but that upon his withdrawal from the Firm his interest in the Plan was segregated into a separate account managed by Judge Irenas until 1996 when the account was required to be deposited and managed by funds offered by Fidelity Investments.

Petitioners also mentioned in their Brief in Support of the Motion at 7-8 and repeat here (Pet. at 7-8) that Judge Irenas' blackjack playing prior to becoming a judge may have been a source of extra-judicial knowledge regarding the case. That Judge Irenas played blackjack prior to becoming a judge meant only that he might have been more familiar with New Jersey law than another judge. "It is no exaggeration to state that the Commission's regulation of blackjack is more extensive than the entire administrative regulation of many industries." *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 169 (1982); N.J.A.C. 19:47-2.1-2.22. As stated by Judge Irenas at Pet. App. at 81, the rules require the dealer to take a hit at 16 and hold at 17. N.J.A.C. 19:47-2.12(b).[4] In sum, the reasons the Third Circuit denied the Motion are apparent.

---

4. The contention that Respondents violated the Act by not providing Petitioners with complimentaries is a frivolous assertion, requiring only logic to reject. Pet. at 7; Pet. App. at 25,44,64. Given to induce play, complimentaries are items or services provided free or at a reduced cost (N.J.S.A. 5:12-14a) such as rooms, food and beverages. N.J.S.A. 5:12-102(m). Respondents had no interest in inducing the play of these admitted card counters. Pet. App. 38-39. Here, the regulations of the CCC authorized the Respondents to engage in counter-measures to discourage their play. N.J.A.C. 19:47-2.5(a) (shuffle at-will after any round of play); N.J.A.C. 19:47-2.14 (discretion to limit player to one betting spot); N.J.A.C. 19:47-8.2(b) (discretion to limit a card counter to the posted table limit and let others bet above the limit); *Doug Grant Inc. v. New Jersey Casino Control Commission*, Nos. A-3605-98T3, A-999-99T3 (N.J. Super. App. Div., April 16, 2001) (no basis for challenge to these regulations).

III.

THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENTS.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) is procedurally and factually distinct. Procedurally, the District Court tried the case without a jury. *Id.* at 850. Here, only legal issues were presented on a F.R. Civ. P. 12(b)(6) motion over which the Third Circuit exercised plenary review. Factually, the Respondent learned 10 months after the original judgment had been affirmed that the District Judge had been a member of the Board of Trustees of a university, which was interested in the outcome of the case. 486 U.S. at 850. Here, the Third Circuit found the Motion "without merit."

Easley v. University of Michigan, 853 F.2d 1351 (6th Cir. 1988) supports the legal result reached here and differs markedly on the facts. First, as noted above, the work revealed in the Firm's letters would not warrant disqualification of Judge Irenas based on Section 455 or *Easley*. Disqualification would have been required only if the lawyer with whom Judge Irenas "previously practiced law served during such association as a lawyer concerning the matter" in controversy. Section 455(b)(5); *Easley*, 853 F.2d at 1358 n.5. No such prior associations were demonstrated here. Second, although some claims were dismissed by the District Court on motion, the District Court conducted a bench trial prior to dismissing plaintiff's equitable claims. *Id.* at 1354-55. Also, unlike here where the Motion was found to be "without merit", the Judge in *Easley* was a member of the law school defendant's "Committee of Visitors", which the Court found "most

potentially troublesome". *Id.* at 1357. Under these facts, the Court determined that the fact that the legal decision "might" be legally correct would not moot the matter. *Id.*; *Accord Health Serv. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 801 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988) (appearance of impropriety not lessened by fact litigation would have come out the same anyway). Here, there was no legal doubt expressed by the Third Circuit, the state courts or the CCC in rejecting the core claim regarding shuffling at will.

IV.

THE MISREPRESENTATIONS CONTINUE UNABATED HERE.

The Petition should also be denied due to factual misrepresentations. The misrepresentations begin with the "Question Presented" and in the statement of "Constitutional and Statutory Provisions". There were neither "serious conflicts" that "only became known during the pendency of an appeal . . ." nor a "conflict of interest arising from the prior representation of defendants . . ." No such record was presented to the Third Circuit, which found the Motion "without merit" and that Petitioners had otherwise engaged in "dramatic hyperbole" and "mischaracterized the facts." Pet. App. 24, 34. Second, the letters from the Firm did not contradict Judge Irenas and did not reveal that the Firm was engaged in a "wide range of casino related issues". Pet. at 3. Petitioners inquired whether Judge Irenas had represented the Respondents or performed consulting work for the CCC or DGE. Judge Irenas responded in the negative and mentioned old work related to the defunct Playboy Casino. Motion, Exh. A,B. Petitioners know that the Firm's prior work on behalf of PEI, one case a year on behalf of CSI

applicants or work on behalf of lenders neither pertained to this case nor could be described as wide ranging. Third, trying to link their case to non-existent casino licensing advice given by the Firm, Petitioners state (Pet. at 5) that their complaint alleged violations of "Section 99" and refer to the record at Pet. App. 14a, 48a. Here were two misrepresentations. N.J.S.A. 5:12-99 requires certain internal controls regarding casino operations to be submitted to the CCC for approval. This prior approval requirement for internal controls is world's apart from the licensing requirements set forth at N.J.S.A. 5:12-82-88, but sounds good coupled with a false insinuation that the Firm provided casino licensing advice to the Respondents. The citation to the record also misleads because the reference is to a conclusion that Respondents had implemented a countermeasure through approved internal controls. Fourth, despite Petitioners' contention (Pet. at 8), Judge Irenas' disclosure that he had played blackjack had nothing to do with the receipt of the Firm's letters. That advice was provided by Judge Irenas in April 1998 (Pet. App. at 81) and was unrelated to the type of work performed by the Firm. This is by no means an exhaustive list, but is enough to show that the pattern recognized by the Third Circuit (Pet. App. at 24) continues here.

CONCLUSION

For the foregoing reasons, the Sands respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

FREDERICK H. KRAUS
Attorney for Respondent
Greate Bay Hotel and Casino, Inc.
t/a "Sands Hotel & Casino"
Sands Hotel & Casino
Indiana Ave. & Brighton Park
Atlantic City, NJ 08401
(609) 441-4517

(3)

Supreme Court, U.S.
FILED
APR 30 2001
OFFICE OF THE CLERK

No. 00-1502

IN THE

Supreme Court of the United States

DOUG GRANT, INC., *et al.*,

Petitioners,

v.

GREATE BAY CASINO CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR CASINO RESPONDENTS (OTHER THAN THE TRUMP CASINO RESPONDENTS) AND GRIFFIN INVESTIGATIONS

JOHN M. DONNELLY
LEVINE, STALLER, SKLAR, CHAN,
BRODSKY & DONNELLY, P.A.
Attorneys for Casino Respondents (other than the Trump Casino Respondents) and Griffin Investigations
3030 Atlantic Avenue
Atlantic City, New Jersey 08401
(609) 348-1300

166784

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

12 pp

STATEMENT PURSUANT TO RULE 29.6

1. Hilton Hotels Corporation
   - Publicly traded
   - South Eastern Asset Management, Inc. owns greater than 10%

2. GNOC, Corp. t/a "Atlantic City Hilton"
   - Not publicly traded
   - Wholly owned subsidiary of Bally's Park Place, Inc. (see 3, below)

3. Bally's Park Place, Inc. t/a Bally's Park Place"
   - Publicly traded
   - No one owns greater than 10% of the stock

4. ITT Corporation
   - Wholly owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc. ("Starwood")
   - No one owns greater than 10% of Starwood

5. ITT Corporation NV
   - Not publicly traded
   - Wholly owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc.

6. Caesar's World, Inc., a/k/a "Caesar's Atlantic City"
   - Wholly owned subsidiary of Bally's Park Place, Inc. (see 3, above)

7. Harrah's Entertainment, Inc.
   - Publicly traded
   - Bank of New York owns greater than 10% of common stock
   - Chase Manhattan Bank owns greater than 10% of common stock
   - Putnum Investments owns greater than 10% of common stock
   - State Street Bank & Trust Company owns greater than 10% of common stock

8. Marina Associates d/b/a "Harrah's Casino Hotel"
   - Not publicly traded
   - Wholly owned subsidiary of Harrah's Entertainment, Inc.

9. Sun International North America, Inc.
   - Not publicly traded
   - Wholly owned subsidiary of Sun International Hotels, Ltd.

10. Sun International Hotels, Ltd.
    - Publicly traded
    - Sun International Investments owns greater than 10%
    - Baron Capital owns greater than 10%

11. Resorts International Hotel, Inc.
    - Not publicly traded
    - Wholly owned subsidiary of Colony RIH Acquisition, Inc. which is not publicly traded

12. Showboat, Inc.
    - Not publicly traded
    - Wholly owned by Harrah's Operating Company which is wholly owned by Harrah's Entertainment, Inc. (see 7, above)

13. Showboat
    - Not publicly traded
    - Wholly owned subsidiary of Ocean Showboat, Inc., which is wholly owned by Showboat, Inc. (see 12, above)

14. Aztar Corporation
    - Publicly traded
    - GAMCO Investors, Inc. owns greater than 10%

15. Adamar of New Jersey, Inc., t/a Tropicana Casino and Resort
    - Not publicly traded
    - Wholly owned subsidiary of Aztar Corporation

16. Claridge Hotel & Casino Corp.
    - Not publicly traded

17. Claridge at Park Place, Inc.
    - Wholly owned subsidiary of Claridge Hotel & Casino Corp. (see 16, above)

18. Griffin Investigations
    - Not publicly traded
    - No public corporation owns greater than 10% of the stock

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents iv

Table of Cited Authorities v

Reasons for Denying the Writ 1

I. Neither The Record Nor The Decision Below Raise The Question Presented By The Petition 2

II. The Third Circuit's Ruling Does Not Have Far Reaching Ethical Implications 4

Conclusion 6

Appendix — Opinion of the Superior Court of New Jersey, Appellate Division Filed April 16, 2001 (submitted separately as Lodging Appendix)

TABLE OF CITED AUTHORITIES

Case: *Page*

Campione v. Adamar of N.J., Inc., 155 N.J. 245, 714 A.2d 299 (N.J. 1998) 4

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the United States Third Circuit Court of Appeal's denial of Petitioner's motion requesting an evidentiary hearing on alleged possible conflicts of interest of the district court warrants a reversal of the Court's decision. Petitioners argue that the Court erred by denying the motion on the purported basis that it was conducting a plenary review of the record. However, the Third Circuit did not deny the motion on the basis represented by Petitioner. Rather, the Third Circuit stated that it had carefully considered the motion and was denying it on the basis that it was without merit. *See Doug Grant, Inc. v. Greate Bay Casino Corporation* 232 F.3d 173, 190 n.8 (3d Cir. 2000). The Court then offered the additional commentary that since it was exercising a plenary review of the district court's dismissal it would not matter even were the Petitioners' concerns arguable. *Id.* This additional comment was not a holding. Even if it were, the Third Circuit was clear that the motion was without merit and the Petitioners concerns were not justified by the record it reviewed.

In framing the purported issue in this case, Petitioners have blatantly mischaracterized the Third Circuit's holding. As recognized by the Third Circuit, and as will be discussed below, the Petitioners have shown a pattern of mischaracterizing facts throughout this litigation. In addition, they have continued a pattern of baseless accusations of conflict on the part of federal court judges. To the Third Circuit they alleged a conflict on the part of the district court; In this Petition, they allege a conflict on the part of the Third Circuit. This is merely more of the chaff that has characterized this case from the beginning. The Third

Circuit's ruling was proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

The issue in the case below was whether certain conduct alleged by the Petitioners to have been taken against them by the individual Atlantic City Casinos and Griffin Investigations was sufficient to support a RICO claim. The Third Circuit thoroughly analyzed each of the allegations of the Petitioners and properly determined that they could not support a RICO claim. The Third Circuit held in part:

> For the reason we have set forth, we have reached the conclusion that appellants' allegations that the casinos or any appellee has committed predicate RICO acts are completely insubstantial and border on the frivolous.

Id. at 187.

The Petitioners purported question presented for review completely mischaracterizes the Third Circuit's decision. The Petitioners seek to have this Court decide a non-existent issue. As noted, this type of conduct is a common thread throughout these proceedings. The Third Circuit noted in one instance:

> Appellants attempt at length to skew the plain meaning of this regulation and the relevant

> regulatory history leading to its adoption to convince us that the CCC has authorized only a "random shuffle-at-will," *i.e.*, not a reshuffle that occurs only during player favorable counts.

Id. at 185. In another portion of its decision the Third Circuit noted:

> We are disturbed that appellants have couched their arguments in dramatic hyperbole obfuscating the real issues. *Indeed, we are satisfied that the appellants have mischaracterized the facts.* For instance, appellants characterize the use of the shuffle-at-will as "secretly removing cards from a blackjack game in progress." See br. at 30. But the reshuffle is hardly secret as the dealer does it openly in the view of the players. Moreover, a dealer reshuffling does not remove cards from the deck. Rather, the reshuffle simply places cards in a different random order for the next hands.

Id. (emphasis added).

Here, Petitioners have once again engaged in a mischaracterization and they premised their entire Petition on that mischaracterization. The Third Circuit did not disregard a conflict of interest on the part of the district court as Petitioners have asserted. It specifically considered the Petitioners allegations and found them to be meritless. *See id.* at 190 n.8.

II.

THE THIRD CIRCUIT'S RULING DOES NOT HAVE FAR REACHING ETHICAL IMPLICATIONS

Petitioners argue that the Third-Circuit's decision will send the "wrong message" to the public and district court judges. This, of course, ignores the actual holdings of the Third Circuit. Rather, it is Petitioners re-litigation of the identical issues in forum after forum that is problematic. The Third Circuit recognized the Petitioners had filed the present action and multiple declaratory petitions with the CCC. Indeed, the Petitioners also had an appeal pending with the New Jersey Superior Court, Appellate Division on the identical issues raised in this matter and had a one point sought a stay from the Third Circuit which application was denied.

The Third Circuit recognized that the New Jersey Supreme Court in *Campione v. Adamar of N.J., Inc.*, 155 N.J. 245, 714 A.2d 299 (N.J. 1998) made it clear that the CCC lawfully may permit the blackjack countermeasures which Petitioners are once again attacking in this litigation. Moreover, since the Third Circuit's instance decision, the New Jersey Superior Court, Appellate Division has rejected yet another challenge to the card-counter countermeasures and upheld the CCC implementation of those rules of the game. In so doing, it also recognized the fact that the same group of Petitioners was seeking to relitigate issues that were disposed of adversely to them in the present federal suit. *See Doug Grant, Inc., et al. v. New Jersey Casino Control Commission,* decided April 16, 2001

(Docket Nos. A-3605-98T3; A-999-99T3) (unpublished, copy submitted separately as a Lodging Appendix). The Appellate Division held:

> Given this standard and the comprehensive control which the Casino Control Act, *N.J.S.A.* 5:12-1 to 152, delegates to the CCC over the "rules and conduct of licensed casino games," *Uston v. Resorts International Hotel, Inc.*, 89 *N.J.* 163, 169 (1982), we see no basis for plaintiffs' challenges to the regulations set out above. We agree with the CCC that the separate challenge to *N.J.A.C.* 19:40-1.3(c), constitutes simply an indirect attack on the three countermeasure regulations. We are unpersuaded by plaintiffs' argument that these regulations operate so as to deprive the non-card counting public of a fair opportunity to win and, indeed, constitute a form of deceptive conduct.

Id.

Thus, it is the conduct of Petitioners and their attorney that raises ethical concerns, not the actions of either of the Courts below. The Petitioners have litigated and re-litigated identical issues *ad nauseam*. Their arguments have been rejected at the federal court level, the New Jersey Agency level, and the New Jersey State Trial, Appellate and Supreme Court level. They now seek to attack those who made these decisions. They attacked the district court judge alleging conflicts of interest. The Third Circuit carefully considered their motion and found the Petitioners allegations to be without merit to warrant an evidentiary hearing. In the present Petition they now attack the Honorable Maryanne Trump

Barry of the Third Circuit alleging conflicts of interest. Judge Barry was not even involved in the Third Circuit's decision. Petitioners desperate and reckless conduct with respect to repeated mischaracterization of the record and attack on federal court judges is nothing short of disgraceful.

The Petitioners purported issue for review is a non-issue. The Third Circuit did not hold that it need not consider the alleged conflict issues since its review was plenary. The Third Circuit considered the motion and denied it on the merits. This case raises no issues of law or ethics which warrants this Court's review.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

JOHN M. DONNELLY
LEVINE, STALLER, SKLAR, CHAN,
BRODSKY & DONNELLY, P.A.
Attorneys for Casino Respondents (other than the Trump Casino Respondents) and Griffin Investigations
3030 Atlantic Avenue
Atlantic City, New Jersey 08401
(609) 348-1300